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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CROWLEY MARITIME CORPORATION, *et al.*,
Petitioners,

v.

SHEREEN RAMONA ZIPFEL, *et al.*
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

These related actions were filed in the United States District Court for the Northern District of California by or on behalf of four foreign workers and one American worker who were killed or injured in an air crash in Indonesia. That federal admiralty court found that U.S. law did not apply to the claims of the foreigners but did apply to the American's claim. The district court then dismissed all of the actions on grounds of *forum non conveniens,* holding that the actions should properly be tried in the Far East—not the United States. The plaintiffs (respondents herein) subsequently activated litigation in the state courts of Texas pressing exactly the same claims that had been dismissed by the federal court. The district court then enjoined the plaintiffs and their attorneys from prosecuting any actions arising out of the air crash in any court in the United States.

Upon appeal, the Ninth Circuit ruled that (i) the district court's enjoining the foreigners' claims was an abuse of discretion; and (ii) the district court had no discretion to dismiss the American's claims on grounds of *forum non conveniens.* Both rulings created conflict with the Fifth Circuit, and the second ruling also created conflict with the Second Circuit.

The questions presented are:

1. Does a federal admiralty trial court have discretion, pursuant to the All Writs Act[1] under the exceptions to the Anti-Injunction Act[2], to issue an injunction prohibiting a plaintiff from relitigating, in the state courts, a lawsuit which has previously been dismissed by that federal court on grounds of *forum non conveniens*?

2. Does the applicability of the U.S. Jones Act[3] to a claim deny the trial court all discretion to dismiss such claim under the doctrine of *forum non conveniens* and this Court's reasoning in *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981)?

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[1] 28 U.S.C. § 1651.
[2] 28 U.S.C. § 2283.
[3] 46 U.S.C. § 688.

LIST OF PARTIES

The parties to the proceedings below were:

Plaintiffs: Shereen Ramona Zipfel, Individually and as Administratrix of Ian Charles Zipfel, deceased; Ten Fong Craig, Individually and as Administratrix of the Estate of William Henry Craig, deceased; Chan Luck Chee; Vyner Gerard Albuquerque; and Patrick Paul Grunke.

Defendants: Crowley Maritime Corporation; Brinkerhoff Maritime Drilling Corporation; Brinkerhoff Maritime Drilling Corporation S.A.; Brinkerhoff Maritime Drilling Corporation PTE, Ltd; Conoco, Inc.; Halliburton Company; Atlantic Richfield Company; Arco Oil & Gas Corp.; McClelland Engineers, Inc.; and Oceaneering International, Inc.

LIST OF PETITIONERS HEREIN AND RULE 28.1 LISTING

This petition is brought by Crowley Maritime Corporation and its wholly-owned subsidiaries Brinkerhoff Maritime Drilling Corporation[4], Brinkerhoff Maritime Drilling Corporation PTE Ltd.[5], and Brinkerhoff Maritime Drilling Corporation S.A.[6]

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[4] Name changed to Crowley International, Inc. 1-25-87.

[5] Liquidated 5-21-86.

[6] The following additional corporations are listed pursuant to the provisions of Rule 28.1: Alcatraz Enterprises, Inc.; Arctic Transportation Ltd.; Crowley All Terrain Corporation; Merlin Petroleum Company; P.T. Patra Drilling Contractor; American Transport Lines, Inc.; Amerasian Offshore Drilling Ltd.; Atlantic Spirit, Inc.; Beacon Insurance Company Ltd.; CCT—Ecuador S.A.; Coordinadora Del Caribe Transmodal, C.A. (CORCA); Coordinadora Del Caribe Transmodal, S.A.; Coordinadora de Carga y Transporte del Peru S.A.; Crowley Atlantic, Inc.; Crowley Caribbean Ltd.; Crowley Carribbean Transport, Inc.; Crowley Constructors, Inc.; Crowley Development Corporation; Crowley Maritime International, Inc.; Crowley International, S.A.; Crowley Maritime Salvage, Inc.; Crowley VI Corporation; Crowley Towing & Transportation Company; CTMT, Inc.; Delta Line, Inc.; Delta Steamship Lines, Inc.; H. Tourist, Inc.; Harbor Carriers, Inc.; The Harbor Tug and Barge Company; Pacific Alaska Fuel Services, Inc.; Pacific Northern Marine Corporation; Puget Sound Tug & Barge Company; San Diego Transportation Company; Terminales y Mantenimiento, Sociedad Anonima; Trailer Marine Transport Corporation; Trailmovil, S.A.; Trans-Caribbean Motor Transport, Inc., P.R.; and WTO Corporation.

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Petitioners Crowley Maritime Corporation, Brinkerhoff Maritime Drilling Corporation, Brinkerhoff Maritime Drilling Corporation S.A., and Brinkerhoff Maritime Drilling Corporation PTE Ltd. respectfully request that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit, entered on November 24, 1987, which reversed issuance of an injunction by the United States District Court for the Northern District of California against relitigation in state court, and which reversed a *forum non conveniens* dismissal by such United States district court.

OPINIONS BELOW

The original opinion of the Court of Appeals is reported at 820 F.2d 1438. On November 24, 1987, the Ninth Circuit filed its amended opinion. This amended opinion is "For Publication" but has not yet been published. It is contained in the appendix at A-1.[7] The opinion of the district court is reported at 615 F.Supp. 1021 and is contained in the appendix at A-32.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1987. A timely petition for rehearing and rehearing *en banc* was denied on November 24, 1987, at which time the Court of Appeals filed its amended opinion. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

These cases involve the Anti-Injunction Act (28 U.S.C. § 2283), the All Writs Act (28 U.S.C. § 1651) and the Jones Act (46 U.S.C. § 688), which are fully set forth in the appendix (A-70—A-71).

STATEMENT OF THE CASE

The material facts below were undisputed and are well and succinctly stated by both the district court in its opinion (A-35—A-37) and the Ninth Circuit in its opinion (A-9—A-11). In brief, the respondents' claims arose out of a 1981 airplane crash in Indonesia. The airplane was operated by an Indonesian corporation which was not a party to the proceedings below and which is beyond the jurisdiction of the district court. The plane was transporting certain individuals (assumed below and for purposes of this petition to have "seamen" status as crew members of the oil drilling vessel BRINKERHOFF I) from Singapore to Indonesia, where they were to be flown by helicopter to the vessel. This drilling rig operation had its base of operations in the Far East.

Eleven related but unconsolidated actions were filed in the District Court for the Northern District of California by or on

[7] References to the appendix are cited herein as "A_____."

behalf of the various seamen who were killed or injured in the crash. The jurisdiction of the district court was invoked under the Jones Act (46 U.S.C. § 688) and under general maritime law. The district court found that foreign law applied to the claims brought by or on behalf of the foreign seamen and that U.S. law (the Jones Act) applied to the claims brought on behalf of the American seamen. Motions to dismiss the actions on the ground of *forum non conveniens* were granted by the district court, which held that the respondents' cases should properly have been heard in Singapore or Indonesia—not the United States. Following the district court's order, a number of the cases originally filed were settled. The present five cases remain, however.

After filing their actions in the district court, these five plaintiffs (respondents herein) filed substantially identical complaints in the state courts of Texas. These state court actions remained dormant while respondents pursued their actions in the district court below. The district court's order of dismissal contained certain conditional protections to allow respondents to refile their actions in Indonesia or Singapore (A-58—A-59). However, respondents did not file actions in Indonesia or Singapore. Instead, they activated their Texas state court lawsuits.

Petitioners then applied to the district court below for a temporary restraining order or for an injunction to enjoin respondents from prosecuting actions arising out of the air crash in the state courts of Texas or in any other court in the United States. The district court restrained and later permanently enjoined the respondents and their attorneys from prosecuting such actions. Meanwhile, the conditions regarding dismissal contained in the district court's order were satisfied so that such order became final. Respondents appealed the decision of the district court to the Ninth Circuit Court of Appeals which had jurisdiction under 28 U.S.C. § 1291. The actions were heard together for purposes of appeal.

The Ninth Circuit agreed with the district court's choice of law analysis and affirmed the district court's dismissal of the foreign seamen's claims. However, it ruled that the district court had abused its discretion in enjoining the foreign seamen

from relitigating their claims in state court. (A-23—A-25). The Ninth Circuit also disagreed with the district court's dismissal of the claim of the American seaman, concluding that the doctrine of *forum non conveniens* is inapplicable to a Jones Act case (A-19—A-23).

At about the same time as the Ninth Circuit's original opinion below, decisions were rendered by the Fifth Circuit which are contrary to the Ninth Circuit's views. Specifically, *Exxon Corp. v. Chick Kam Choo,* 817 F.2d 307 (5th Cir.) *cert. granted,* 108 S.Ct. 343 (Nov. 16, 1987), is contrary to the Ninth Circuit on the injunction issue. The Fifth Circuit's *en banc* decision of *In Re Air Crash Disaster Near New Orleans, Louisiana,* 821 F.2d 1147, n.25 (5th Cir. 1987), is contrary to the Ninth Circuit's position on the role of *forum non conveniens* in a Jones Act case and accepts the reasoning of Judge Schwarzer of the district court below regarding the impact of *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981), on the Jones Act/*forum non conveniens* issue. Significantly, *In Re Air Crash Disaster Near New Orleans, Louisiana* disapproved and overruled the major authority relied upon by the Ninth Circuit in reaching its contrary conclusion that *forum non conveniens* has no application to a Jones Act case.

The Second Circuit's decision in *Cruz v. Maritime Co. of Philippines,* 702 F.2d 47 (2d Cir. 1983) is also contrary to the Ninth Circuit on the *forum non conveniens* issue. Petitioners brought these conflicting decisions to the Ninth Circuit's attention by way of petitions for rehearing and rehearing *en banc,* which petitions were denied.

REASONS FOR GRANTING THE WRIT

There are three reasons to grant the present writ:

First, the decision below creates a conflict between the Fifth Circuit and the Ninth Circuit on the injunction issue, and the Supreme Court has recently granted a petition for certiorari in the Fifth Circuit case (*Exxon Corp. v. Chick Kam Choo*). There are also conflicts between the Ninth Circuit and the Second and Fifth Circuits on the Jones Act/*forum non conveniens* issue.

Second, the questions presented are important ones which, if decided incorrectly, will radically undermine much-needed national uniformity in federal maritime law. The Fifth Circuit has ruled that federal maritime *forum non conveniens* rules preempt conflicting state law doctrines. The Ninth Circuit disagrees. The Fifth and the Second Circuits have ruled that Jones Act cases are not exempt from *forum non conveniens* analysis, but like other cases are subject to this Court's holding in *Piper Aircraft Co. v. Reyno.* The Ninth Circuit disagrees.

Third, the Ninth Circuit is in error in its holding that *forum non conveniens* dismissals are not "on the merits" so as to preclude injunctions against relitigation. That court also errs in holding that a Jones Act case must be heard in the United States no matter how inconvenient, and even if there is no evidence or witnesses to be found in the United States.

A. Conflict Between The Circuits.

1. The Ninth Circuit's Injunction Holding Conflicts With The Fifth Circuit's Holding.

The Ninth Circuit's decision squarely conflicts with the Fifth Circuit's decision in *Exxon Corp. v. Chick Kam Choo,* 817 F.2d 307 (5th Cir. 1987). Apparently, this Court agrees. On November 16, 1987, the petition for a writ of certiorari in the *Chick Kam Choo* case, based on that conflict, was granted.

2. The Ninth Circuit's Decision That *Forum Non Conveniens* Analysis Has No Place In A Jones Act Case Conflicts With Decisions Of Both The Second And Fifth Circuits.

The district court below dismissed the claim of Ten Fong Craig while holding that the Jones Act would have applied if the case were kept in the United States. The issue, as framed by the district court, was whether or not (given *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981)) a Jones Act claim is subject to a *forum non conveniens* dismissal. The Ninth Circuit reversed this portion of the district court's decision and held that: "[W]hen the Jones Act applies to a seaman's claim, that

claim may not be dismissed on the ground of *forum non conveniens.*" (A-23).

The Fifth Circuit in *In Re Air Crash Disaster Near New Orleans, Louisiana,* 821 F.2d 1147, n.25 (5th Cir. 1987) found the *Piper* reasoning of the district court below to be persuasive. This Fifth Circuit decision is contrary to the Ninth Circuit and recognizes that Jones Act cases are subject to *Piper* and *forum non conveniens.* The Second Circuit in *Cruz v. Maritime Co. of Philippines,* 702 F.2d 47 (2d Cir. 1983), also rejected the idea that *forum non conveniens* analysis has no place in a Jones Act case.

B. Importance Of The Questions.

1. The Ninth Circuit's Decision On The Injunction Issue Raises Important Questions About The Effect Of Federal *Forum Non Conveniens* Dismissals.

Whether or not a disappointed litigant whose action has been dismissed under the doctrine of *forum non conveniens* in a federal admiralty court is thereafter free to relitigate the issue until he finds a sympathetic judge who will decide to keep his case is an important question which should be settled by this Court. The resolution of this question will affect many other persons apart from the actual litigants who are before the Court. Indeed, it will affect the U.S. maritime industry generally, and it is the undersigned's information that the Maritime Law Association of the United States intends to petition for leave to file an amicus brief in the *Chick Kam Choo* case on this very issue. The Fifth Circuit in *Chick Kam Choo* recognized the importance of the issue when it noted that "[*f*]*orum non conveniens* is a 'characteristic feature' of maritime law" and that:

> [T]he need for uniform application of the doctrine by all courts in the United States is particularly acute because of the transnational and international nature of the interests at stake in a *forum non conveniens* inquiry.
>
> 817 F.2d at 320.

and that:

> The doctrine of *forum non conveniens* is the heart and soul of the federal policy of judicial self-restraint in the day-to-day workings of the maritime law. Texas cannot be allowed to thwart that policy in a maritime case brought to its courts.
>
> *Id.* at 323.

Such reasoning contrasts markedly with the very brief treatment given to the subject by the Ninth Circuit which held that *forum non conveniens* was a mere "procedural point."

Even if petitioners were successful in convincing the Texas state court to decline to hear the cases, what happens next? By respondents' logic, they could then refile their suits in the California state courts. Assume petitioners are again successful in California. Respondents then go on to the next jurisdiction, and so on through the fifty states and the federal system in the hope that somewhere a single, sympathetic judge will decide to keep the cases.[8] It is hard to imagine a more bizarre and wasteful procedure. The basic issue that was before the district court was the appropriateness of the United States forum. That issue was litigated and decided. However, the Ninth Circuit's position that the district court possesses no power to enjoin relitigation of this issue affords plaintiffs an infinite number of opportunities to try to stay in a U.S. forum. The Ninth Circuit's decision will lead to a complete waste of federal judicial resources. Instead of preventing or discouraging relitigation, the Ninth Circuit actually invites relitigation with its view that a judgment of dismissal is not a "judgment" for purposes of 28 U.S.C. § 2283.

2. The Choice of Law/*Forum Non Conveniens* Issue Is Of National Importance Because It Will Affect U.S. Maritime Workers Throughout The World.

Do seamen, whose claims would be governed by U.S. law if the trials were held in the U.S., come by absolute right into

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[8] During all these proceedings the statutes of limitation would be tolled. *Burnett v. N.Y. Central Ry. Co.*, 380 U.S. 424 (1965); *Reynolds v. Logan Charter Service, Inc.*, 565 F.Supp. 84 (N.D. Miss. 1983); *Marczak v. McAllister Bros., Inc.*, 439 F.Supp. 1075 (S.D. N.Y. 1977); *Izquierdo v. Cities Service Oil Co.*, 244 F.Supp. 758 (S.D. N.Y. 1965).

the United States courts in each and every case no matter how inconvenient the trials may be? Stated another way, are these cases exempt from the practical analysis of the "private interest" and "public interest" convenience factors mandated by this Court in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947)? The Supreme Court held in *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981), that, even if the remedy available abroad may be somewhat less generous than the U.S. remedy, that fact should not be dispositive of the *forum non conveniens* question. Did not *Piper* announce a comprehensive standard as to all *forum non conveniens* issues in the federal courts?

The Fifth Circuit recognizes that the conflict between the Fifth and the Ninth Circuits on this point substantially affects a rule of national application in which there is an overriding need for national uniformity:

> We believe that a single and uniform approach to the analysis and application of the *forum non conveniens* doctrine best serves litigants and the courts. We, therefore, expressly disapprove of and overrule our Jones Act and general maritime case law that utilizes a modified *forum non conveniens* analysis. Henceforth, all cases, including Jones Act and maritime actions, are governed by the dictates of *Reyno* and this opinion.
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> *In Re Air Crash Disaster Near New Orleans, Louisiana,* 821 F.2d 1147, 1164, n.25 (5th Cir. 1987).

C. The Ninth Circuit Is In Error In Its Treatment Of The Injunction Issue and The *Forum Non Conveniens*/Jones Act Issue.

1. The Injunction Decision Is Erroneous Because The District Court's Decision Was On the Merits and The Ninth Circuit's Contrary View Leads To Chaotic Results.

The relitigation exception to the Anti-Injunction Act allows a United States district court to enjoin state court proceedings where the injunction will "protect or effectuate" the judgment of the district court. In the Ninth Circuit's view, this exception did not support the district court's injunction because there was

no decision "on the merits." The court of appeals overlooks the fact that the decision was "on the merits" as to the issue that was litigated, i.e. the inappropriateness and inconvenience of the U.S. forum. The Ninth Circuit's holding was wrong and leads to absurd results.

The Fifth Circuit in *Chick Kam Choo* dealt with the question of *res judicata* or (in the context of that case) issue preclusion or direct estoppel. At 817 F.2d 312, the Fifth Circuit emphasized with approval Professor Wright's statement regarding *forum non conveniens* that "[I]ssue preclusion is appropriate if the issue actually remains the same." The Fifth Circuit recognized that "[T]he species of *res judicata* with which we deal today is known as direct estoppel." *See also Samuel C. Ennis & Co., Inc. v. Woodmar Realty Co.,* 542 F.2d 45, 49 (7th Cir. 1976), *cert. denied,* 479 U.S. 1096 (1977), a 28 U.S.C. § 2283 case which is in accord. In other words, the district court's order exercising its discretion to dismiss the cases was subject to *res judicata* principles for purposes of the Anti-Injunction Act. That act refers to a federal "judgment". The present cases involve a final federal judgment of dismissal.

In *American Surety Co. v. Baldwin,* 287 U.S. 156, 166 (1932), Justice Brandeis stated: "the principles of *res judicata* apply to questions of jurisdiction as well as to other issues." *See Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.,* 709 F.2d 190, 195 (3rd Cir.), *cert. denied,* 464 U.S. 938 (1983); *Browning Debenture Holders' Committee v. DASA Corp.,* 605 F.2d 35, 39 (2d Cir. 1978); *Harper Plastics, Inc. v. Amoco Chemicals Corp.,* 657 F.2d 939 (7th Cir. 1981). *See also Koziol v. The Fylgia,* 230 F.2d 651 (2d Cir.), *cert. denied,* 352 U.S. 827 (1956), which involved a seaman whose federal court Jones Act action was dismissed for *forum non conveniens.* The appellate court held that the dismissal went to the merits and precluded relitigation under the doctrine of *res judicata.*

In the present cases the record shows that the parties litigated hard and long over the issue of whether or not the United States was a more or less appropriate forum than Indonesia or Singapore. The district court concluded that, on balance, the Far East presented the more convenient forum. Indeed, the Ninth Circuit agreed. All parties made extensive

reference to the appropriateness or inappropriateness of the "American" or "United States" forum, and nowhere was it urged that any facts or evidence existed that even remotely intimated that Texas was an appropriate forum.

The Second Circuit stated in *Zoriano Sanchez v. Caribbean Carriers Ltd.*, 552 F.2d 70, 72 (2d Cir. 1977):

> It is clear from the facts in the present case that plaintiffs-appellants press the same claim, involving the same parties and arising out of the same circumstances, before the district court in New York as they did before the district court in Puerto Rico. The issue of subject matter jurisdiction as to the Jones Act claims was "actually litigated and determined by a valid and final judgment," and that determination having been essential to that judgment, appellants are precluded from raising the issue once again in the Southern District of New York.

The Third Circuit concludes that a *forum non conveniens* decision has preclusive effect:

> In this case the appellants point to identical objective criteria and rely on identical material facts underlying the application of those criteria. Their contention amounts to no more than a wish that, in applying the objective criteria to the undisputed facts, a different judge would make the discretionary *forum non conveniens* determination. If appellants expected the district judge in Delaware to exercise a more discreet discretion than his judicial brother in the Southern District of New York, then they should have begun their litigation in Delaware. Having now finally lost in New York, they cannot relitigate the same factual and legal issues in Delaware.
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> *Pastewka v. Texaco, Inc.*, 565 F.2d 851, 854 (3rd Cir. 1977).

The Ninth Circuit's view conflicts with Federal Rule of Civil Procedure 41(b) which provides that such a dismissal is "upon the merits". *See Nasser v. Isthmian Lines*, 331 F.2d 124

(2d Cir. 1964), which holds that a so-called "procedural" dismissal is "on the merits" pursuant to Federal Rule of Civil Procedure 41(b).

The Seventh Circuit considered FRCP 41(b) in *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 943 (7th Cir. 1981):

> A more modern view includes not only those judgments based on legal rights, but extends to dismissals on other than traditionally substantive grounds. See Fed.R.Civ.P. 41(b); Reporter's Note, Restatement (Second) of Judgments § 48, at 42-43. Indeed, the Restatement (Second) of Judgments dispenses with the "on the merits" terminology "because of its possibly misleading connotations" Restatement (Second) of Judgments § 48 at 36 (Tent Draft No. 1 1973).

The Ninth Circuit overlooks its own previous decision in *Villar v. Crowley Maritime Corporation,* 782 F.2d 1478 (9th Cir. 1986), where the district court was expressly authorized and directed to make pretrial findings of disputed factual issues and reach the merits of the *forum non conveniens* and choice of law issues.

Perhaps the most disquieting aspect of all is respondents' candid admissions below that the Texas state court might well decline, for its own reasons, to give *res judicata* or issue preclusive effect to the previous works of the federal courts and decide under its own doctrine of *forum non conveniens* to keep the cases. After all the time, trouble and effort that the parties and the federal courts have gone through to litigate the issue of the inappropriateness of a U.S. forum, it would be manifestly unjust that a state court judge might decide to keep the cases and proceed to trial.

Respondents, in the first instance, chose the federal Northern District of California as their forum. They made their United States *forum non conveniens* arguments at length to the district court; they lost. Respondents made their arguments at length to the Ninth Circuit; they lost. That should be enough. "It is time for this litigation to come to an end in the United

States and return to Singapore where it belongs." *Exxon Corp. v. Chick Kam Choo,* 817 F.2d at 323.

There has already been immense and substantial litigation in these cases. The eighth anniversary of the air crash which gave rise to this litigation is fast approaching. The complaints were filed almost five years ago. The issues were brought to or before the Ninth Circuit on several occasions. The parties and the courts have expended hundreds of hours and thousands of dollars. There are approximately 240 pleadings and other papers on the district court docket. There were five lengthy hearings before the district court. There was oral argument before the Ninth Circuit. Several written opinions were issued by the district court. One was published. Two published opinions were issued by the Ninth Circuit. There was a final adjudication through the federal system, which judicial system was chosen in the first instance by respondents.

Yet, respondents would argue that all of this was a meaningless exercise of judicial effort since the judgment has no preclusive effect. Unfortunately, the Ninth Circuit would support such an argument since, notwithstanding the foregoing, in the Ninth Circuit's view all that has been decided is a mere "procedural point." If the Ninth Circuit is correct, the result is to make a mockery of federal *forum non conveniens* and to invite endless relitigation. By what principle can a plaintiff be stopped from applying to an infinite number of courts? What does such a bizarre scenario do but destroy the federal judgment, not "protect or effectuate" it as contemplated by 28 U.S.C. § 2283? This is antithetical to maritime principles of national uniformity established long ago and repeatedly upheld by this Court.

In *Toucey v. New York Life Insurance Co.,* 314 U.S. 118 (1941), the Supreme Court held that a federal court was without power to enjoin state court relitigation of cases and controversies fully adjudicated by the federal courts. The Reviser's Notes to Section 2283 indicate that it was enacted explicitly to overrule *Toucey; accord, Mitchum v. Foster,* 407 U.S. 225, 236 (1972). Thus, Justice Reed has been vindicated. He dissented in *Toucey* with the following words:

> [The] alternative [to allowing injunctions against relitigation] is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of *res judicata* which is to be examined by another court unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication. (footnote omitted) We, too, desire that the difficulties innate in the federal system of government be smoothed away without a clash of sovereignties, but we find no cause for alarm in affirming a court which forbids parties bound by its decree to fight the battle over on another day and field. (footnote omitted)

314 U.S. at 144.

Such words fit precisely the situation that confronted the district court below.[9]

2. The *Forum Non Conveniens*/Jones Act Decision Is Erroneous Because It Ignores *Piper Aircraft Co. v. Reyno* and Is Based On Authority Which Has Been Overruled.

The error of the Ninth Circuit on the Jones Act/*forum non conveniens* issue is that it refused to consider the district court's analysis of the impact of *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981) on the Jones Act claim. *Piper* rejected the notion that a *forum non conveniens* motion should be decided on the basis of differences in substantive law. Nothing in *Piper* carves

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[9] Petitioners herein are vitally interested in the outcome of *Chick Kam Choo* and respectfully request that the present actions be consolidated with that case so that these petitioners will have the opportunity to present their cases to the Supreme Court. Should the Court deny this petition on the basis that the petitioners can wait until *Chick Kam Choo* is decided, petitioners respectfully point out that petitioners and the foreign respondents would then be into Texas state court litigation on the *res judicata* issue. Petitioners may well be precluded from returning to the federal court for an injunction because the Supreme Court's ruling in *Parsons Steel, Inc. et al. v. First Alabama Bank, et al.,* 474 U.S. 518, 524 (1986), limits "the relitigation exception of the Anti-Injunction Act to those situations in which the state court has not yet ruled on the merits of the *res judicata* issue."

out any exception for Jones Act cases, and the district court concluded that *Piper* undercuts the argument that *forum non conveniens* is *never* available in cases under the Jones Act (A-53—A-58).

However, the Ninth Circuit in its opinion of November 24, 1987, ignored *Piper* and relied on authority (*Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289 (5th Cir. 1984)), which the Fifth Circuit has expressly disapproved and overruled (*In Re Air Crash Near New Orleans, Louisiana, supra,* n.25).

The other cases relied upon by the Ninth Circuit (*Needham v. Phillips Petroleum Co. of Norway,* 719 F.2d 1481 (10th Cir. 1983) and *Szumlicz v. Norwegian America Line, Inc.*, 698 F.2d 1192 (11th Cir. 1983)) must also be questioned. *Szumlicz (Id.* at 1195) relied exclusively on Fifth Circuit authority which has been overruled; *Needham* relied on Fifth Circuit and Second Circuit authority which has been overruled. *See In Re Air Crash Disaster Near New Orleans, Louisiana, supra* and *see Cruz v. Maritime Co. of Philippines, supra.* The *Needham* court also relied on *De Mateos v. Texaco, Inc.*, 562 F.2d 895 (3rd Cir. 1977), *cert. denied,* 435 U.S. 904 (1978). But the United States Supreme Court in *Piper* specifically disapproved of (at 454 U.S. 253) *the very language* in *De Mateos* which purportedly would tie a district court's hands in a Jones Act/*forum non conveniens* situation. None of the cases relied upon by the Ninth Circuit addresses the specific issue of whether, after *Piper,* a Jones Act case may be dismissed for *forum non conveniens.*

The Ninth Circuit concluded by stating that its view was "buttressed by decisions of the Supreme Court in which the Court has commented upon the unavailability of *forum non conveniens* as a basis for dismissal of cases filed under the Federal Employers' Liability Act (FELA)." (A-21—A-22). However, the FELA case cited by the Ninth Circuit for this proposition (*Baltimore & Ohio R. Co. v. Kepner,* 314 U.S. 44 (1941)) was not a *forum non conveniens* case! Nor did *Kepner* limit the power of a court to protect its own docket and dismiss a case on *forum non conveniens* grounds. *State of Missouri ex Rel Southern Ry. Co. v. Mayfield,* 340 U.S. 1, 5 (1950) is a post-

Kepner case which is in accord that a court may dismiss a FELA action on grounds of *forum non conveniens.*

In summary, the authority cited by the Ninth Circuit for the proposition that *forum non conveniens* analysis has no place in a Jones Act case is no longer valid authority. The analogy to FELA is inapposite and erroneous. The Ninth Circuit disregards the Supreme Court's admonition in *Gulf Oil* that the crucial element of the *forum non conveniens* analysis is consideration of "practical problems that make trial of a case easy, expeditious and inexpensive" (330 U.S. at 508). The Ninth Circuit disregards this Court's teaching in *Piper* that "the central purpose of any *forum non conveniens* inquiry is to ensure the trial is convenient. . ." *Piper,* 454 U.S. at 256.

CONCLUSION

For foregoing reasons, a writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Dated: December 23, 1987.

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHEREEN RAMONA ZIPFEL, Individually and as Administratrix of Ian Charles Zipfel, deceased, *Plaintiff-Appellant*, v. HALLIBURTON COMPANY; ATLANTIC RICHFIELD COMPANY; CROWLEY MARITIME CORPORATION BRINKERHOFF MARITIME DRILLING, INC.; CONTINENTAL OIL COMPANY (CONOCO, INC.); HUDSON BAY OIL & GAS COMPANY, LTD.; HUDBAY OIL, LTD. (INDONESIA); BRINKERHOFF MARITIME DRILLING, PTD, LTD.; HUDBAY OIL (MALACCA), LTD.; DOME PETROLEUM, LTD.; DOME PETROLEUM CORPORATION; ARCO OIL AND GAS CORPORATION; PT AIRFAST SERVICES INDONESIA; and EXQUISITOR HELICOPTER CORPORATION, *Defendants-Appellees*.	**Nos. 86-1815** **86-1832** **86-1834** **86-1835** **86-1836** **D.C. Nos.** **CV-83-0603-WWS** **CV-83-0604-WWS** **CV-83-0605-WWS** **CV-83-0606-WWS** **CV-83-0607-WWS** **ORDER AMENDING OPINION**

TEN FONG CRAIG, Individually and as Administratrix of the Estate of William Henry Craig, deceased,
Plaintiff-Appellant,

v.

ATLANTIC RICHFIELD COMPANY; CROWLEY MARITIME CORPORATION; INC.; BRINKERHOFF MARITIME DRILLING, INC.; CONTINENTAL OIL COMPANY (CONOCO, INC.); HUDSON BAY OIL & GAS COMPANY, LTD.; HUDBAY OIL, LTD. (INDONESIA); BRINKERHOFF MARITIME DRILLING, S.A.; BRINKERHOFF MARITIME DRILLING, PTE, LTD.; HUDBAY OIL (MALACCA), LTD.; DOME PETROLEUM LTD.; DOME PETROLEUM CORPORATION; PT AIRFAST SERVICES INDONESIA; and EXQUISITOR HELICOPTER CORPORATION,
Defendants-Appellees.

CHAN LUCK CHEE,
Plaintiff-Appellant,

v.

MCCLELLAND ENGINEERS, INC.; MCCLELLAND ENGINEERS, S.A.; MCCLELLAND ENGINEERS SDN. BHD.; HALLIBURTON COMPANY; ATLANTIC RICHFIELD COMPANY; CROWLEY MARITIME CORPORATION; BRINKERHOFF MARITIME DRILLING, INC.; CONTINENTAL OIL COMPANY (CONOCO, INC.); HUDSON BAY OIL & GAS COMPANY, LTD.; HUDBAY OIL, LTD. (INDONESIA); BRINKERHOFF MARITIME DRILLING, S.A.; BRINKERHOFF MARITIME DRILLING, PTE, LTD.; DOME PETROLEUM, LTD.; DOME PETROLEUM CORPORATION; ARCO OIL AND GAS CORPORATION; PT AIRFAST SERVICES INDONESIA; AND EXQUISITOR HELICOPTER CORPORATION,
Defendants-Appellees.

VYNER GERARD ALBUQUERQUE,
Plaintiff-Appellan

v.

OCEANEERING INTERNATIONAL, INC.; OCEANEERING INTERNATIONAL, SDN, BHD.; HALLIBURTON COMPANY; ATLANTIC RICHFIELD COMPANY; CROWLEY MARITIME CORPORATION, BRINKERHOFF MARITIME DRILLING, INC.; CONTINENTAL OIL COMPANY (CONOCO, INC.); HUDSON BAY OIL & GAS COMPANY, LTD.; HUDBAY OIL, LTD. (INDONESIA); BRINKERHOFF MARITIME DRILLING, PTE, LTD. HUDBAY OIL (MALACCA), LTD.; DOME PETROLEUM, LTD.; DOME PETROLEUM CORPORATION; ARCO OIL AND GAS CORPORATION; PT AIRFAST SERVICES INDONESIA; and EXQUISITOR HELICOPTER CORPORATION,
Defendants-Appellees.

PATRICK PAUL GRUNKE,
Plaintiff-Appellant,

v.

ATLANTIC RICHFIELD COMPANY; CROWLEY MARITIME CORPORATION; BRINKERHOFF MARITIME DRILLING, INC.; CONTINENTAL OIL COMPANY (CONOCO, INC.); HUDSON BAY OIL & GAS COMPANY, LTD; HUDBAY OIL, LTD. (INDONESIA); BRINKERHOFF MARITIME DRILLING, S.A.; BRINKERHOFF MARITIME DRILLING PTE, LTD.; HUDBAY OIL (MALACCA), LTD.; DOME PETROLEUM, LTD.; DOME PETROLEUM CORPORATION; ARCO OIL AND GAS CORPORATION; PT AIRFAST SERVICES INDONESIA; AND EXQUISITOR HELICOPTER CORPORATION,
Defendants-Appellees.

Filed June 23, 1987
Amended November 24, 1987

ORDER

The opinion filed June 23, 1987 is amended as follows:

I

The third sentence of the first grammatical paragraph on page 11 of the slip opinion is deleted. This deleted sentence reads: "BMD employed Grunke and decedent Craig; Halliburton Ltd. and Halliburton Inc. employed decedent Zipfel; McClelland S.A. and McClelland Engineering Inc. employed Chee; and P. T. Calmarine and Oceaneering employed Albuquerque."

The deleted sentence is replaced with the following sentence: "BMD employed Grunke and decedent Craig; the district court found that Zipfel was employed by Halliburton Ltd., Chee by McClelland Engineers S.A., and Albuquerque by Oceaneering International, S.D.N. B.H.D., each a foreign subsidiary of defendants/appellees Halliburton Company."

II

A new reference to footnote 9 is added at the end of the paragraph which begins on page 22 of the slip opinion with the words "Were we to apply a *forum non conveniens* analysis to the claim on behalf of . . .", and which ends on page 23 with the words ". . . should not be dismissed for *forum non conveniens.*'." New footnote 9 provides:

> [9]The Fifth Circuit has recently signaled its departure from this position. *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1163 n.25 (5th Cir. 1987). In footnote 25 of *Air Crash*, a divided en banc panel of the Fifth Circuit, with Judges Garza, Johnson, Garwood, and Higginbotham not joining in the footnote, stated that in view of the Supreme Court's opinion in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), and the district court's analysis in the present case, *Sherrill v. Brinkerhoff Mari-*

time Drilling, 615 F. Supp. 1021, 1034-35 (N.D. Cal. 1985), it disapproved and overruled all of its Jones Act case law in which it had previously held that if the Jones Act applied to a case, then the case should not be dismissed for *forum non conveniens. Air Crash,* 821 F.2d at 1163 n.25. *Air Crash* was not a Jones Act case.

III

The footnote reference in the text on page 24 of the slip opinion is changed from 9 to 10, as is the numbering of the footnote at the bottom of that page.

IV

The following is inserted in the opinion just above "CONCLUSION" after the paragraph on page 27 of the slip opinion which ends with the words ". . . an abuse of discretion.":

> The recent Fifth Circuit case of *Exxon Corporation v. Chick Kam Choo,* 817 F.2d 307 (5th Cir. 1987) is inapposite. In *Exxon,* the surviving wife of a seaman who had been injured and died on board ship in Singapore, brought suit in the federal district court in Houston, Texas. The district court granted the defendants' motion for summary judgment "as to Plaintiffs' claims under the Jones Act, the Death on the High Seas Act, the Longshoremen's and Harbor Workers Compensation Act, *and the general maritime laws of the United States." Exxon,* 817 F.2d at 310 n.4 (emphasis in original). Having thus disposed of these claims on the merits, the court nonetheless granted the defendants' motion to dismiss "under the doctrine of *forum non conveniens,* . . . without prejudice," and subject to conditions which permitted the plaintiff to refile her suit in Singapore. *Id.*
>
> The judgment permanently enjoined the plaintiff from prosecuting any action against the defendants in the courts of Texas or any other state, arising out of or related to the

death of the plaintiff's husband on board ship in Singapore. The plaintiff did not appeal this judgment and it became final. She then attempted to pursue, against the defendants in the state court in Houston, Texas, the same claims she had filed against them in the federal district court in Houston. The defendants filed a new suit in federal court in Houston to enjoin the state proceeding. The district court granted a permanent injunction enjoining the state proceeding and sanctioned the plaintiff's attorneys for pursuing it.

The Fifth Circuit, with one member of the three-judge panel concurring and one dissenting, affirmed the judgment of the district court. What established the opinion as a majority opinion was the concurrence of Judge Clark. He pointed out that the plaintiff was simply bound by the earlier judgment which enjoined her from relitigating the case in state court; he did not concur in Judge Gee's *forum non conveniens* analysis. *Exxon,* therefore, is not a majority opinion on *forum non conveniens* and hence is not in conflict with our unanimous opinion in this case.

OPINION

THOMPSON, Circuit Judge:

These related but unconsolidated actions were filed in the United States District Court for the Northern District of California by or on behalf of American and foreign seamen who were killed or injured in an air crash in Indonesia. The actions were filed under the Jones Act, 46 U.S.C. § 688, the Shipowners Liability (Sick and Injured Seamen) Convention of 1936, 54 Stat. 1963, general maritime law, and state law. Motions to dismiss the actions on the ground of *forum non conveniens* were filed and denied. Upon reconsideration, another judge of the same court granted the motions and dismissed all of the cases, subject to conditions. *Sherrill v. Brinkerhoff Maritime Drilling,* 615 F. Supp. 1021 (N.D. Cal. 1985). The dismissal order was filed August 12, 1985. It provided in part that the order would become final "as to any

plaintiff upon that plaintiff's failure to have filed a new action [in Indonesia or Singapore] upon the expiration of ninety days from the date of filing this order." No plaintiff filed such an action. Instead, a parallel Texas state court action which some of the plaintiffs had previously filed was reactivated. The district court then restrained, and later permanently enjoined, the plaintiffs and their attorneys from prosecuting any action arising out of the air crash in any court in the United States. This permanent injunction was included in a final judgment which the district court entered January 31, 1986. The final judgment dismissed all of the plaintiffs' actions, unconditionally, on the ground of *forum non conveniens.* A number of the cases originally filed were settled. Five cases remain, and are involved in this appeal.

We have jurisdiction under 28 U.S.C. § 1291. We affirm the district court's dismissal of the foreign seamen's claims. We reverse the dismissal of the claim filed on behalf of the deceased American seaman. We vacate that part of the permanent injunction enjoining the foreign seamen from prosecuting their claims in state court. We modify and affirm the grant of the permanent injunction as it pertains to the claim filed on behalf of the American seaman.

FACTS AND PROCEEDINGS

The plaintiffs' claims arise out of a 1981 airplane crash at Simpang Tiga Airport in Indonesia. The airplane was operated by P.T. Airfast Services, an Indonesian corporation, and chartered by Hudbay Oil, an Indonesian subsidiary of a Canadian corporation. At the time of the crash, the airplane was transporting crew members of the oil drilling vessel, Brinkeroff I, from Singapore to Indonesia, where the crew members were to be flown by helicopter to the vessel. The Brinkerhoff I is an American flag vessel. For approximately nineteen months prior to the crash, this vessel had operated in Far Eastern waters near Indonesia and Singapore. As the district court observed:

> It is not disputed that the operative facts on which liability and damages are premised occurred in Indonesia, and to a

> lesser extent, in Singapore. These include the maintenance and operation of the aircraft by Airfast, the chartering of the aircraft by Hudbay, and the actions of the crew and the Indonesian air traffic controllers. Eye witnesses and other knowledgeable persons are located there. Records and physical evidence relating to the operation and crash of the aircraft, the activities of the defendants, the injuries suffered by plaintiffs, and the post-accident investigation are also located there. It may be, as plaintiffs contend, that other evidence is scattered around the world, but none of it is shown to be located in this district. That the bulk of it is located in Singapore or Indonesia is demonstrated by plaintiffs' consolidated deposition notice . . .

Sherrill, 615 F. Supp. at 1031-32.

The Brinkerhoff I is owned by Brinkerhoff Maritime Drilling Corporation ("BMD"), a Delaware corporation with home offices in San Francisco. BMD's base of corporate operations was San Francisco, California, and the Brinkerhoff I's base of operations was either Singapore or Indonesia, or both.[1] The crew members whose claims are involved in this appeal were employees, respectively, of some of the defendants. BMD employed Grunke and decedent Craig; the district court found that Zipfel was employed by Halliburton Ltd., Chee by McClelland Engineers S.A., and Albuquerque by Oceaneering International, S.D.N. B.H.D., each a foreign subsidiary of defendants/appellees Halliburton Company. Decedent Craig was an American and his wife, plaintiff Ten Fong Craig, is Singaporean; decedent Zipfel was British and his wife, plaintiff Shereen Ramona Zipfel, is Singaporean; plaintiffs Chee and Albuquerque are Singaporean; and plaintiff Grunke is Australian.

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[1] The specific location of the Brinkerhoff I's operations was determined by Atlantic Richfield Indonesia, Inc. ("ARII"), pursuant to a Day-Work Drilling Contract between BMD and ARII. Although plaintiffs make much of American choice of law and forum clauses in this contract, it is not relevant to this action that BMD and ARII agreed to resolve conflicts between themselves in America. *See Bailey v. Dolphin International, Inc.*, 697 F.2d 1268, 1276, n.24 (5th Cir. 1983).

The cases were originally assigned to District Judge Aguilar. The defendants moved to dismiss all of the actions on the ground of *forum non conveniens.* Judge Aguilar concluded that American law applied to all of the cases and denied the motions. The cases were subsequently reassigned to District Judge Schwarzer. The defendants renewed their *forum non conveniens* motions. Judge Schwarzer concluded that American law, and consequently the Jones Act, applied only to the claim of the American crew member, and foreign law applied to the claims of the foreign crew members. He then dismissed all of the cases on the ground of *forum non conveniens,* subject to conditions.[2] The permanent injunction and final judgment of dismissal followed.

DISCUSSION

A. The District Court's Reconsideration of Previous Denial of Motion

We review for abuse of discretion a district judge's decision to reconsider an interlocutory order by another judge of the same court. *Castner v. First National Bank,* 278 F.2d 376, 380 (9th Cir. 1960). In *Castner* we stated that the second judge does not conscientiously carry out his judicial function "if he permits what he believes to be a prior erroneous ruling to control the case." 278 F.2d at 380.

[1] Judge Schwarzer chose to reconsider Judge Aguilar's denial of the defendants' *forum non conveniens* motions because, in his view, Judge Aguilar had failed to consider relevant Supreme Court precedent, including the Supreme Court's decision in *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981), and had failed to follow relevant Ninth Circuit precedent, including our decision in *Phillips v. Amoco Trinidad Oil Co.,* 632 F.2d 82 (9th Cir. 1980), *cert. denied sub nom., Romilly v. Amoco Trinidad Oil Co.,* 451 U.S. 920 (1981). As we stated in *Castner,* "we are not concerned at this stage with whether the

[2] The conditions of dismissal were that the defendants (1) submit to the foreign court's jurisdiction, (2) waive any statute of limitations defenses, (3) make witnesses available, (4) not object to use of discovery materials and (5) agree to satisfy any judgment entered against them.

second judge is in fact correct, but whether he was justified in reviewing the prior judge's ruling at all. [The second judge's] substantive ruling may be, as a matter of law, erroneous, yet his right and power to [reconsider the prior judge's interlocutory ruling] is perfectly justified as a matter of discretion." *Castner*, 278 F.2d at 380-81. Judge Schwarzer did not abuse this discretion by deciding to reconsider Judge Aguilar's prior ruling.

B. *The District Court's Forum Non Conveniens Dismissal Order*

1. *Standard of Review*

We review for abuse of discretion a district court's dismissal of a case on the ground of *forum non conveniens*. *Piper*, 454 U.S. at 237; *Pereira v. Utah Transport, Inc.*, 764 F.2d 686, 690 (9th Cir. 1985), *cert. dismissed*, 106 S. Ct. 1253 (1986).

> The forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.

Piper, 454 U.S. at 257 (citations omitted).

[2] Before dismissing a case for *forum non conveniens*, a district court must first make a choice of law determination.[3] *Pereira*, 764 F.2d at 688. We review the district court's choice of law determination de novo. *Id.*; *Phillips*, 632 F.2d at 84. We review under the clearly erroneous standard the district court's

[3] The Second Circuit has stated that a choice of law determination is not involved in a *forum non conveniens* analysis. *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47, 48 (2nd Cir. 1983) (per curiam). The Second Circuit stands alone in this view. *See Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289, 292-93 (5th Cir. 1984); *Needham v. Phillips Petroleum co. of Norway*, 719 F.2d 1481, 1483 (10th Cir. 1983); *Szumlicz v. Norwegian American Line, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983). *See also* Edelman, *Forum non Conveniens: Its Application in Admiralty Law*, 15 J. of Maritime Law and Commerce 517, 529-32 (1984).

findings of fact underlying its choice of law determination. *Villar v. Crowley Maritime Corp.*, 782 F.2d 1478, 1479-80 (9th Cir. 1986).

2. *Choice of Law*

a. *The "Seaman Status" Requirement*

[3] For the Jones Act to apply, "seaman" status must be established. *Estate of Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326, 1327 (9th Cir. 1983). The district court assumed the injured and deceased crew members were "seamen." This assumption is not challenged on appeal. Accordingly, we treat all of the injured and deceased crew members as "seamen."

b. *Analysis*

The Supreme Court in *Lauritzen v. Larsen*, 345 U.S. 571, 583-92 (1953) listed seven factors to be considered in determining whether a claim is subject to the Jones Act: (1) place of the wrongful act; (2) the flag of the vessel; (3) allegiance or domicile of the injured party; (4) allegiance of the shipowner; (5) place and choice of law of the contract; (6) accessibility of a foreign forum; and (7) law of the forum. In *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 308-309 (1970), the Court added an eighth factor: the shipowner's base of operations.[4] In *Rhoditis*, the Court emphasized that the factors should not be applied in a mechanical fashion, and that the list is not exhaustive. *Id.*

(i) *The "Drilling Vessel" Qualification*

In cases involving typical "blue-water" vessels "plying international waters," the law of the flag is of "cardinal importance." *Lauritzen*, 345 U.S. at 584. "[T]he law of the flag [is applied] on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her." *Id.* at 585. For this reason, "the weight

[4] The analysis for determining whether the Jones Act applies to these claims is also controlling on the issue whether to apply American maritime law. *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959).

given to the ensign overbears most other connecting events in determining applicable law" aboard traditional vessels. *Id.*

In cases involving atypical vessels such as semi-submersible or floating oil drilling vessels, however, courts do not give the law of the flag controlling weight; rather, other factors are emphasized. *Koke v. Phillips Petroleum Co.*, 730 F.2d 211, 219 (5th Cir. 1984); *Phillips*, 632 F.2d at 86-87. The place of the injury, the domicile of the injured person and the location where the employment contract was entered into take on greater significance. *Koke*, 730 F.2d at 219; *Phillips*, 632 F.2d at 86-87. The base of the vessel's day-to-day operations is considered to be more important than the location of the corporate headquarters. *Phillips*, 632 F.2d at 88.

Plaintiffs argue that the drilling vessel qualification should not apply to the Brinkerhoff I because it was not a stationary drilling rig.[5] Although *Phillips* involved a drilling rig which remained in one location for several years, the drilling rig analysis has been applied to vessels which do not remain in a single fixed location. In *Koke*, 730 F.2d at 219, the Fifth Circuit applied the drilling rig analysis to a non-stationary drilling vessel which could move under its own power. The *Koke* court described the vessel in these words:

> While the Sedco/Phillips SS certainly has greater mobility than a fixed rig which may remain in place for several years, it was not, and was not designed to function as, a vessel "plying the seas" in the traditional sense. It is a semi-submersible platform that rests on columns attached to flotation chambers. Its movements occur within a

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[5] Between 1979 and February 1983, the Brinkerhoff I operated at the following locations:

June 1979-Sept. 1979	South China Sea
Sept. 1979-Nov. 1979	Singapore Harbor
Nov. 1979-April 1981	Java Sea
April 1981-June 1981	Malacca Straits
June 1981	To Singapore Harbor for ten days of repairs
June 1981-Feb. 1983	Java Sea

The airplane crash out of which these cases arose occurred April 28, 1981.

> specific and limited georgraphical area. Further, when travel over long distances is required, it is apparently towed to a location. . . .

Id.

[4] The district court found that the Brinkerhoff I was unable to move under its own power, had to be towed by other vessels when moved, and had remained for long periods of time prior to the accident at only a few drilling locations in the general vicinity of Indonesia. *Sherrill*, 615 F. Supp. at 1027-28. These findings support the district court's conclusion that the drilling vessel qualification applies to the Brinkerhoff I. *Koke*, 730 F.2d at 219.

(ii) *Applying the Choice of Law Factors*

The applicability of the Jones Act to the claim for the death of the American seaman was not disputed. Accordingly, the district court determined that the Jones Act applied to his claim. This determination is not challenged on appeal.[6]

[5] In determining whether the Jones Act applies to the claims of the foreign seamen, the district court focused on the factors which receive greater weight in the drilling rig context. These factors point toward the application of foreign law to these claims. The place of the alleged wrongful act was Indonesia, the base of operations was Indonesia or, to a lesser extent, Singapore, and the employment contracts or other hiring arrangements were made in foreign locations. Moreover, the allegiance of the injured foreign seamen is foreign and a foreign forum is accessible to them. While other factors point toward application of American law (the law of the flag, the allegiance of the defendant shipowner, the corporate headquarters of the defendant shipowner, the corporate headquarters of the defendant shipowner, and the law of the forum), these factors are of lesser importance in a choice of law analysis where the vessel is a drilling rig as opposed to a typical blue-water vessel plying

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[6] That all the claims in this case arise out of one occurrence does not require the application of uniform law to the claims of plaintiffs of differring nationalities. *In Re Ocean Ranger Sinking Off Newfoundland on February 15, 1982*, 589 F. Supp. 302, 320 and n.21 (E.D. La. 1984).

international waters. *Koke*, 730 F.2d at 219-20; *Phillips*, 632 F.2d at 86-88. The district court concluded that foreign law, not American law, applies to the claims of the foreign seamen. We agree.

3. *Forum Non Conveniens Analysis*

[6] Having determined that foreign law applies to the claims of the foreign seamen, and it having been conceded that American law applies to the claim on behalf of the deceased American seaman, we now consider whether the district court erred in dismissing all of the claims for *forum non conveniens*. We consider separately the claims of the foreign seamen and the claim on behalf of the deceased American seaman.

a. *The Foreign Seamen*

i. *Availability of an Alternative Forum*

> At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is "amenable to process" in the other jurisdiction. [*Gulf Oil Corp. v.*] *Gilbert*, 330 U.S. [501,] 506-507 [(1947)]. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute. (citation omitted).

Piper, 454 U.S. at 254, n.22.

The defendants bear the burden of proving the existence of an adequate alternative forum. *Cheng v. Boeing Co.*, 708 F.2d 1406, 1411 (9th Cir.), *cert. denied sub nom. Lui Su Nai-Chao v. Boeing Co.*, 464 U.S. 1017 (1983). They carried this burden. As to Singapore, the defendants submitted affidavits and declarations which showed that the courts of Singapore have jurisdiction over parties submitting to their jurisdiction, which submission may be by consent; that the defendants may waive the statute of limitations; that discovery of documents and interrogatories are available, but depositions are allowed only

in certain circumstances; that witnesses may be subpoenaed within Singapore; that Singapore permits third party indemnity claims; that Singapore has adopted English common law with respect to claims for personal injury and English law generally with respect to air transport cases, and has a wrongful death statute.

As to Indonesia, the defendants' affidavits and declarations established that Indonesian and foreign parties may submit to the jurisdiction of Indonesian courts by written consent; that under the Indonesian Civil Code, defendants may waive the statute of limitations; that the court can compel the attendance of witnesses; and that third party indemnity claims are permitted. These affidavits and declarations further showed that Indonesian courts would apply Indonesian law, and remedies would be available to the injured seamen and their survivors under Indonesia's Workmen's Compensation Law, under the Indonesian Civil Code for Negligence, under the Indonesian Carriage by Air Act, and under the Warsaw Convention.

[7] The affidavits which the plaintiffs filed in the district court were insufficient to counter significantly the affidavits and declarations filed on behalf of the defendants. The plaintiffs, however, have now submitted supplemental affidavits which they ask us to consider for the first time on appeal. They contend these supplemental affidavits show that neither Singapore nor Indonesia is a satisfactory alternative forum. Normally, we will not permit the record on appeal to be supplemented with evidence not presented to the district court. *Karmun v. Commissioner,* 749 F.2d 567, 570 (9th Cir. 1984), *cert. denied,* 106 S. Ct. 66 (1985). *See* Fed. R. App. P. 10(a); Ninth Circuit Rules 4(a), 4(b) and 13(a)(1). However, even if we were to consider the plaintiffs' proferred affidavits, we would still agree with the district court that the defendants have established that Singapore and Indonesia are satisfactory alternative fora.[7] Such alternative fora may not provide all of the remedies and benefits which might be available in an American court, but the remedies provided are not "so clearly

[7] The defendants request that sanctions be imposed against the plaintiffs for attempting to submit supplemental affidavits on appeal. The request is denied.

inadequate or unsatisfactory that [there] is no remedy at all." *Piper,* 454 U.S. at 254. The plaintiffs' "potential damages award may be smaller, [but] there is no danger that they will be deprived of any remedy or treated unfairly." *Id.* at 255. Accordingly, we conclude that a satisfactory alternative forum exists for the resolution of these claims of the foreign seamen.

ii. *Private and Public Interest Factors*

We have determined that foreign law is applicable to the claims of the foreign seamen, and that satisfactory alternative fora exist for the resolution of these claims. We now consider, and balance, the private interest and public interest factors described by the Supreme Court in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508 (1947). We listed these factors in *Pereira:*

> The private interest factors include: (1) relative ease of access to sources of proof; (2) availability of compulsory process for attendance of unwilling witnesses, and cost of obtaining attendance of willing witnesses; (3) possibility of viewing subject premises; (4) all other factors that render trial of the case expeditious and inexpensive. (citation omitted).
>
> The public interest factors include: (1) administrative difficulties flowing from court congestion: (2) imposition of jury duty on the people of a community that has no relation to the litigation; (3) local interest in having localized controversies decided at home; (4) the interest in having a diversity case tried in a forum familiar with the law that governs the action; (5) the avoidance of unnecessary problems in conflicts of law. (citation omitted).

Pereira at 690.

(a) *The Private Interest Factors*

[8] In applying the private interest factors to the foreign seamen's claims, the district court noted that access to the sources of proof clearly pointed to trial in Singapore or Indonesia. Most of the evidence and witnesses are located at or near the crash site in Indonesia or the airport in Singapore

where the airplane was serviced and prepared for take-off.[8] The district court further noted that none of the evidence or witnesses was located in California, and that none of the material witnesses was subject to compulsory process in the district court, whereas many were located in Indonesia and Singapore and would be subject to process in those courts. Although plaintiffs have agreed to stipulate that they will pay all the costs of bringing these witnesses to the United States, they cannot assure that the witnesses will be willing to make this journey. The district court also noted that it may not be able to acquire personal jurisdiction over potential third-party defendants such as Airfast and the government of Indonesia. The district court concluded that the balance of the private interest factors tips in favor of dismissing, for *forum non conveniens,* the foreign seamen's lawsuits. We agree.

(b) *The Public Interest Factors*

[9] In its consideration of the public interest factors, the district court found that the foreign seamen's lawsuits lacked a significant connection with the district court forum; that California had no interest in the actions; that the lawsuits would impose a burden on the district court's docket and would impede the ability of local litigants to get their cases to trial; that it would be a burden to the people of the community to have to sit as jurors on the cases; and that the application of foreign law in a foreign forum would not be inconsistent with the convenience of the foreign seamen. These findings weigh in favor of dismissal of the claims.

[10] We conclude that the district court did not abuse its discretion in dismissing the foreign seamen's lawsuits for *forum non conveniens,* subject to the conditions which the district court imposed. *See Pereira,* 764 F.2d at 690 (approving similar conditions); *Koke,* 730 F.2d at 214 (same); *In re Ocean Ranger,* 589 F. Supp. at 323 (same).

b. *The American Seaman's Claim*

[11] Were we to apply a *forum non conveniens* analysis to the claim on behalf of the deceased American seaman, we

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[8] Plaintiffs argue that a localized liability inquiry is not necessary because the cause of the crash was established as pilot error. Defendants have not admitted that pilot error was the sole cause of the plane crash, and suggest that some fault is attributable to Indonesian air traffic controllers.

might well conclude that his claim should also be dismissed. There are, after all, the same alternative fora available for resolution of his claim. The remedies are not as attractive as the remedy under the Jones Act, but notwithstanding this disadvantage, there still is a remedy. *See Piper,* 454 U.S. at 249 and 254. And, if we were to consider the private and public interest factors, we might conclude that they favor dismissal of the American seaman's case. The fact that this claim has been filed in an American court on behalf of an American is a factor which points toward retention of the American seaman's case. *See Piper,* 454 U.S. at 255-56 ("When the home forum has been chosen, it is reasonable to assume that this choice is convenient"). But this factor is not decisive. *Id.,* n.23. What is decisive, however, and what distinguishes the American seaman's claim from the claims of the foreign seamen, is the concession of the parties and the conclusion of the district court that the Jones Act applies to the claim for the deceased American. The Fifth, Tenth and Eleventh Circuits (in cases involving claims by or on behalf of foreign seamen) have all held that if the Jones Act applies to a seaman's claim, dismissal for *forum non conveniens* is precluded. *See Nicol v. Gulf Fleet Supply Vessels, Inc.,* 743 F.2d 289, 293 (5th Cir. 1984) ("this Court has held that if American law [i.e., the Jones Act] applies, a federal court should retain jurisdiction.' (citation omitted)): *Needham v. Phillips Petroleum Co. of Norway,* 719 F.2d 1481, 1483 (10th Cir. 1983) ("if American law [i.e., the Jones Act] is applicable to the case, the forum non conveniens doctrine is inapplicable." (citation omitted)): *Szumlicz v. Norwegian American Lines, Inc.,* 698 F.2d 1192, 1195 (11th Cir. 1983) ("if United State law [i.e., the Jones Act] applies, the case should not be dismissed for forum non conveniens.").[9]

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[9] The Fifth Circuit has recently signaled its departure from this position. *In re Air Crash Disaster Near New Orleans, La.,* 821 F.2d 1147, 1163 n.25 (5th Cir. 1987). In footnote 25 of *Air Crash,* a divided en banc panel of the Fifth Circuit, with Judges Garza, Johnson, Garwood, and Higginbotham not joining in the footnote, stated that in view of the Supreme Court's opinion in *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981), and the district court's analysis in the present case, *Sherrill v. Brinkerhoff Maritime Drilling,* 615 F. Supp. 1021, 1034-35 (N.D. Cal. 1985), it disapproved and overruled all of its Jones Act case law in which it had previously held that if the Jones Act applied to a case, then the case should not be dismissed for *forum non conveniens. Air Crash,* 821 F.2d at 1163 n.25. *Air Crash* was not a Jones Act case.

Only the Second Circuit has taken a different view. *See Cruz v. Maritime Co. of Philippines,* 702 F.2d 47, 48 (2nd Cir. 1983) (per curiam). Until this decision, "[i]t had been axiomatic . . . that if the Jones Act applied under *Rhoditis,* an American court could not decline to hear the case." Edelman, *Forum non Conveniens; Its Application in Admiralty Law,* 15 J. of Maritime Law and Commerce 517, 529. Although *Cruz* has recently been cited by the Second Circuit as standing for the proposition that "the forum non conveniens doctrine is applicable in Jones Act cases," *Transunion Corp. v. PepsiCo, Inc.,* 811 F.2d 127, 130 (2nd Cir. 1987) (a fraud and civil RICO action), it has been suggested that statements to this effect in *Cruz* are dicta because in *Cruz* American law did not apply to the injured seaman's claim. *See* Edelman, 15 J. of Maritime Law and Commerce 517, 530 (1984), reporting comments by Professor Y. N. Yiannopoulos, W. R. Irby Professor of Law at Tulane Law School. This suggestion appears to have merit. The injured seaman in *Cruz* was Filipino. He was injured while aboard a vessel which was passing through American waters. At the time of the injury, the vessel was moored in the Port of Camden, New Jersey. The owners and crew were all Philippine citizens, except one officer who was a U.S. citizen permanently residing in the Philippines. The vessel flew the Philippine flag. The defendant's principal base of operations was the Philippines. Considering all of these factors, the district court concluded that the Jones Act did not apply, and dismissed the case for *forum non conveniens. Cruz v. Maritime Co. of Philippines,* 549 F. Supp. 285 (S.D.N.Y. 1982), *aff'd* 702 F.2d 47 (2nd Cir. 1983). The Second Circuit did not address the question whether the Jones Act applied. Instead, in affirming the district court's dismissal, it stated that a choice of law analysis is not appropriate in a Jones Act case. 702 F.2d at 48. However, if the Jones Act did not apply to the case, as the facts suggested and the district court concluded, then this comment does indeed appear to be dictum.

[12] In any event, however, we find the decisions of the Fifth, Tenth and Eleventh Circuits which preclude dismissal of a Jones Act case for *forum non conveniens* to be persuasive. This view is buttressed by decisions of the Supreme Court in which the Court has commented upon the unavailability of

forum non conveniens as a basis for dismissal of cases filed under the Federal Employers' Liability Act (FELA). In *Gilbert,* the Court stated: "It is true that in cases under the Federal Employers' Liability Act we have held that plaintiff's choice of a forum cannot be defeated on the basis of *forum non conveniens.*" 330 U.S. at 505. The Court in *Gilbert* cited *Baltimore & Ohio R. Co. v. Kepner,* 314 U.S. 44 (1941) for this proposition. In *Kepner,* the Court stated that the "privilege of venue, granted by the legislative body which created this right of action [under the FELA], cannot be frustrated for reasons of convenience or expense." 314 U.S. at 54. The Jones Act incorporates the FELA, 46 U.S.C. § 688(a),[10] and both the Jones Act and the FELA have specific venue provisions. The FELA provides in relevant part:

> Under this chapter an action may be brought in a district court of the United States, in the district court of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing the action.

45 U.S.C. § 56.

The portion of the Jones Act which pertains to jurisdiction and venue provides:

> Jurisdiction in [actions under the Jones Act] shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

46 U.S.C. § 688(a).

[13] In view of the Supreme Court's comments as to the unavailability of the *forum non conveniens* doctrine in FELA cases, the degree of similarity between the specific venue provisions under the Jones Act and under the FELA, and the incorporation of the FELA into the Jones Act, we believe that

[10] Section 688(a) of the Jones Act provides in relevant part: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." 46 U.S.C. § 688(a).

the *forum non conveniens* doctrine should be unavailable as a ground for dismissal under the Jones Act as it is under the FELA. (*Cf. La Seguridad v. Transytur Line,* 707 F.2d 1304, 1310, n.10 (11th Cir. 1983) (suggesting that Congress implicitly spoke to, and rejected, the *forum non conveniens* doctrine in both FELA and Jones Act cases); *and see Dalla v. Atlas Maritime Co.,* 562 F. Supp. 752, 757 (C.D. Cal. 1983) ("[W]hen a seaman has a cause of action based on American law, he comes by right into American courts."), *aff'd* 771 F.2d 1277 (9th Cir. 1985). Finally, we see no reason to depart from the clear weight of authority in those circuits which have considered this question. We hold that when the Jones Act applies to a seaman's claim, that claim may not be dismissed on the ground of *forum non conveniens.*

C. *The Injunction*

[14] When the district court dismissed the plaintiffs' lawsuits for *forum non conveniens,* the plaintiffs who did not settle their claims reactivated lawsuits they had previously filed in the Texas state court. In response to this, the district court enjoined the plaintiffs and their attorneys from "filing and/or prosecuting actions in the state courts of Texas or any other court in the United States . . . arising out of the air crash on April 28, 1981. . . ." We review the grant of this injunction for abuse of discretion. *Golden v. Pacific Maritime Ass'n.* 786 F.2d 1425, 1426 (9th Cir. 1986).

The Anti-Injunction Act provides that:

> A court of the United States may not grant an injunction to stay proceedings in a state court except [1] as expressly authorized by act of Congress or [2] where necessary in aid of its jurisdiction or [3] to protect or effectuate its judgment.

28 U.S.C. § 2283.

This court strictly construes these three exceptions to the Anti-Injunction Act. *Alton Box Board Co. v. Espirit de Corp.,* 682 F.2d 1267, 1271 (9th Cir. 1982).

[15] The first exception to the Anti-Injunction Act does not apply here, because there is no express statutory authorization for an injunction in this situation. The second exception

applies to the American seaman's lawsuit, because, under our holding in this case, the district court will retain jurisdiction over that lawsuit. *See Alton Box,* 682 F.2d at 1271. This exception does not apply, however, to the foreign seamen's lawsuits because the district court no longer has jurisdiction over those suits. *Id.* The district court held that jurisdiction was more properly in a foreign forum and dismissed the foreign seamen's cases. At that point there was no need for an injunction to protect the district court's jurisdiction. *Id.*

[16] The third exception to the Anti-Injunction Act similarly does not support the district court's injunction. This court has held that a district court may grant an injunction to protect the *res judicata* effect of its judgment "where a federal litigant has prevailed on the merits, yet is threatened with burdensome and repetitious relitigation of the same issues in a multiplicity of actions." *Golden,* 786 F.2d at 1427. Defendants argue that a determination on the merits is not required for an injunction against state court actions when a district court has dismissed a lawsuit for *forum non conveniens* arising in the same matters. The wording of our cases, however, is explicit, and refers to decisions on the merits. *See Golden,* 786 F.2d at 1427; *Midkiff v. Tom,* 725 F.2d 502, 504 (9th Cir. 1984). Here, defendants have prevailed on a procedural point pertaining to the propriety of the prosecution of the foreign seamen's lawsuit in a United States district court. No judgment on the merits has been rendered. The grant of the injunction against the foreign seamen prosecuting their lawsuits in state court violated the Anti-Injunction Act and was an abuse of discretion.

The recent Fifth Circuit case of *Exxon Corporation v. Chick Kam Choo,* 817 F.2d 307 (5th Cir. 1987) is inapposite. In *Exxon,* the surviving wife of a seaman who had been injured and died on board ship in Singapore, brought suit in the federal district court in Houston, Texas. The district court granted the defendants' motion for summary judgment "as to Plaintiffs' claims under the Jones Act, the Death on the High Seas Act, the Longshoremen's and Harbor Workers Compensation Act, *and the general maritime laws of the United States.*" *Exxon,* 817 F.2d at 310 n.4 (emphasis in original). Having thus disposed

of these claims on the merits, the court nonetheless granted the defendants' motion to dismiss "under the doctrine of *forum non conveniens, . . .* without prejudice," and subject to conditions which permitted the plaintiff to refile her suit in Singapore. *Id.*

The judgment permanently enjoined the plaintiff from prosecuting any action against the defendants in the courts of Texas or any other state, arising out of or related to the death of the plaintiff's husband on board ship in Singapore. The plaintiff did not appeal this judgment and it became final. She then attempted to pursue, against the defendants in the state court in Houston, Texas, the same claims she had filed against them in the federal district court in Houston. The defendants filed a new suit in federal court in Houston to enjoin the state proceeding. The district court granted a permanent injunction enjoining the state proceeding and sanctioned the plaintiff's attorneys for pursuing it.

The Fifth Circuit, with one member of the three-judge panel concurring and one dissenting, affirmed the judgment of the district court. What established the opinion as a majority opinion was the concurrence of Judge Clark. He pointed out that the plaintiff was simply bound by the earlier judgment which enjoined her from relitigating the case in state court; he did not concur in Judge Gee's *forum non conveniens* analysis. *Exxon,* therefore, is not a majority opinion on *forum non conveniens* and hence is not in conflict with our unanimous opinion in this case.

CONCLUSION

The district court did not abuse its discretion in reconsidering the earlier denial of the defendants' *forum non conveniens* motions. The district court correctly determined that foreign law applies to the claims of the foreign seamen, and it did not abuse its discretion in dismissing the foreign seamen's lawsuits for *forum non conveniens.* The district court did abuse its discretion in dismissing the lawsuit on behalf of the deceased

American seaman, because the Jones Act applies to this claim. *Nickol,* 743 F.2d 289; *Needham,* 719 F.2d 1481; *Szumlicz,* 698 F.2d 1192.

The injunction enjoining the foreign seamen from prosecuting their claims in state court is precluded by the Anti-Injunction Act. Accordingly, that portion of the injunction is vacated. Since the district court will be retaining the lawsuit filed on behalf of the deceased American seaman, however, that portion of the injunction enjoining the prosecution of the lawsuit on his behalf in any other court in the United States is appropriate but is modified to except prosecution in the United States District Court for the Northern District of California. The portion of the judgment granting the permanent injunction as to the claim for the deceased American seaman is affirmed as modified.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, MODIFIED AND REMANDED.

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NOV 24 1987
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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHEREEN RAMONA ZIPFEL, Individually and as Administratix of Ian Charles Zipfel, deceased,
Plaintiff-Appellant,

vs.

HALLIBURTON COMPANY; ATLANTIC RICHFIELD COMPANY; CROWLEY MARITIME CORPORATION; BRINKERHOFF MARITIME DRILLING, INC.; CONTINENTAL OIL COMPANY HUDBAY OIL, LTD. (INDONESIA): OIL & GAS COMPANY, LTD.,; HUDBAY OIL, LTD. (INDONESIA); BRINKERHOFF MARITIME DRILLING, PTD, LTD.; HUDBAY OIL (MALACCA), LTD.; DOME PETROLEUM, LTD.; DOME PETROLEUM CORPORATION; ARCO OIL AND GAS CORPORATION; PT AIRFAST SERVICES INDONESIA; and EXQUISITOR HELICOPTER CORPORATION,
Defendants-Appellees.

Nos. 86-1815
86-1832
86-1834
86-1835
86-1836
D.C. nos.
CV-83-0603-WWS
CV-83-0604-WWS
CV-83-0605-WWS
CV-83-0606-WWS
CV-83-0607-WWS

ORDER

TEN FONG CRAIG, Individually and as Administratrix of the Estate of William Henry Craig, deceased,
Plaintiff-Appellant,

vs.

ATLANTIC RICHFIELD COMPANY; CROWLEY MARITIME CORPORATION; BRINKERHOFF MARITIME DRILLING, INC.; CONTINENTAL OIL COMPANY (CONOCO, INC.); HUDSON BAY OIL & GAS COMPANY, LTD.; HUDBAY OIL, LTD. (INDONESIA); BRINKERHOFF MARITIME DRILLING, S.A.; BRINKERHOFF MARITIME DRILLING, PTE, LTD.; HUDBAY OIL (MALACCA), LTD.; DOME PETROLEUM LTD.; DOME PETROLEUM CORPORATION; PT AIRFAST SERVICES INDONESIA; and EXQUISITOR HELICOPTER CORPORATION,

Defendants-Appellees.

CHAN LUCK CHEE,

Plaintiff-Appellant,

vs.

MCCLELLAND ENGINEERS, INC.;
MCCLELLAND ENGINEERS, S.A.;
MCCLELLAND ENGINEERS
SDN. BHD.; HALLIBURTON COMPANY;
ATLANTIC RICHFIELD COMPANY;
CROWLEY MARITIME CORPORATION;
BRINKERHOFF MARITIME DRILLING, INC.;
CONTINENTAL OIL COMPANY (CONOCO, INC.);
HUDSON BAY OIL & GAS COMPANY, LTD.;
HUDBAY OIL, LTD. (INDONESIA);
BRINKERHOFF MARITIME DRILLING, S.A.;
BRINKERHOFF MARITIME DRILLING, PTE, LTD.;
DOME PETROLEUM, LTD.;
DOME PETROLEUM CORPORATION;
ARCO OIL AND GAS CORPORATION;
PT AIRFAST SERVICES INDONESIA,
and EXQUISITOR HELICOPTER CORPORATION,

Defendants-Appellees

VYNER GERARD ALBUQUERQUE,

Plaintiff-Appellant

VS.

OCEANEERING INTERNATIONAL, INC.; OCEANEERING INTERNATIONAL, SDN, BHD.; HALLIBURTON COMPANY; ATLANTIC RICHFIELD COMPANY; CROWLEY MARITIME CORPORATION, BRINKERHOFF MARITIME DRILLING, INC.; CONTINENTIAL OIL COMPANY (CONOCO, INC.); HUDSON BAY OIL & GAS COMPANY, LTD.; HUDBAY OIL, LTD. (INDONESIA); BRINKERHOFF MARITIME DRILLING, PTE, LTD. HUDBAY OIL (MALACCA), LTD.; DOME PETROLEUM, LTD.; DOME PETROLEUM CORPORATION; ARCO OIL AND GAS CORPORATION; PT AIRFAST SERVICES INDONESIA; and EXQUISITOR HELICOPTER CORPORATION,

Defendants-Appellees.

PATRICK PAUL GRUNKE,

Plaintiff-Appellant,

vs.

ATLANTIC RICHFIELD COMPANY; CROWLEY MARITIME CORPORATION; BRINKERHOFF MARITIME DRILLING, INC.; CONTINENTAL OIL COMPANY (CONOCO, INC.); HUDSON BAY OIL & GAS COMPANY, LTD; HUDBAY OIL, LTD. (INDONESIA); BRINKERHOFF MARITIME DRILLING, S.A.; BRINKERHOFF MARITIME DRILLING PTE, LTD.; HUDBAY OIL (MALACCA), LTD.; DOME PETROLEUM, LTD.; DOME PETROLEUM CORPORATION; ARCO OIL AND GAS CORPORATION; PT AIRFAST SERVICES INDONESIA; AND EXQUISITOR HELICOPTER CORPORATION,

Defendants-Appellees.

Opinion filed June 23, 1987

Appellees' Motion to Supplement Petition for Rehearing filed September 1, 1987 is GRANTED.

The opinion filed herein on June 23, 1987 is amended pursuant to the Order Amending Opinion. With this amendment, the panel as constituted above has voted to deny the Appellants' and the Appellees' petitions for rehearing and suggestions for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The Appellants' and the Appellees' petitions for rehearing are DENIED and the suggestions for rehearing en banc are REJECTED.

United States District Court,
N.D. California

Aug. 9, 1985.

CORA E. SHERRILL, Individually
and as Administratrix
of the Estate of
Max O. Sherrill, Deceased,
Plaintiff,

v.

BRINKERHOFF MARITIME
DRILLING, a corporation et al.,
Defendants.

TIMOTHY P. JONES,
Plaintiff,

v.

BRINKERHOFF MARITIME
DRILLING, a corporation et al.,
Defendants.

DAVID ALFRED LOWRY,
Plaintiff,

v.

BRINKERHOFF MARITIME
DRILLING, a corporation et al.,
Defendants.

DAVID S. SCHWARTZ, as
Administratrix
of the Estate of James C. Owen,
Plaintiff.

v.

BRINKERHOFF MARITIME
DRILLING, a corporation, et al.,
Defendants.

MURRAY ROBERT COLE,
Plaintiff,

v.

BRINKERHOFF MARITIME
DRILLING, a corporation, et al.,
Defendants.

SHEREEN RAMONA ZIPFEL,
Individually and as
Administratrix of the Estate of
IAN CHARLES ZIPFEL, deceased,
Plaintiff,

v.

HALLIBURTON CO., et al.,
Defendants.

TEN FONG CRAIG,
Individually and as
Administratrix of
the Estate of WILLIAM
HENRY CRAIG, deceased,
Plaintiff,

v.

ATLANTIC RICHFIELD CO., ET AL.,
Defendants.

CHAN LUCK CHEE,
Plaintiff,

v.

MCCLELLAND ENGINEERS, INC., et al.,
Defendants.

PATRICK PAUL GRUNKE,
Plaintiff,

v.

ATLANTIC RICHFIELD CO., et al.,
Defendants.

VYNER GERARD ALBUQUERQUE,
Plaintiff,

v.

OCEANEERING INTERNATIONAL, INC., et al.,
Defendants.

MICHAEL WAYNE CRAIG,
Plaintiff,

v.

BRINKERHOFF MARITIME DRILLING, et al.,
Defendants.

**NOS. C-82-0836-WWS,
C-82-2565-WWS,
C-82-2566-WWS,
C-82-2568-WWS,
C-82-2569-WWS,
C-83-0603-WWS to
C-83-0607-WWS and
C-83-1022-WWS.**

MEMORANDUM OF OPINION AND ORDER

SCHWARZER, District Judge.

Before the Court are eleven actions brought by or on behalf of seamen who were killed or injured in an air crash in Indonesia. These actions were related pursuant to Local Rule 205-2 for assignment to a single judge; they have, however, not been consolidated. Pursuant to the court's assignment plan they were later reassigned from that judge to the undersigned.

Prior to the reassignment, defendants filed motions to dismiss for forum non conveniens. The motions were denied by another judge of this court. Following reassignment, defendants renewed their motions. The Court granted those motions by order of June 10, 1985, but on reconsideration vacated its order on July 25, 1985. The motions are now before the Court for renewed consideration and decision.

I.

FACTS

The facts material to the disposition of these motions are undisputed and are briefly summarized below.

On April 28, 1981, an aircraft operated by P. T. Airfast Services ("Airfast"), an Indonesian corporation, crashed on approach for landing at Simpang Tiga Airport, Pekanbaru, North Sumatra, Indonesia. The aircraft had been chartered by Hudbay Oil (Malacca Strait) Limited ("Hudbay") to transport employees of Brinkerhoff Maritime Drilling Corporation ("BMD") between Singapore and Pekanbura, Sumatra. From the airport at Pekanbaru, the passengers were to be transported by helicopter to the drilling barge Brinkerhoff I, then operating in the Straits of Malacca in Indonesian waters.

The Brinkerhoff I is an American flag drilling barge, registered in San Francisco, California, owned by BMD, a Delaware corporation with its home office in San Francisco. In October 1979, BMD entered into a Day-Work Drilling Contract with Atlantic Richfield Indonesia, Inc., ("ARII"), negotiated in Indonesia. Pursuant to this contract, BMD agreed to furnish

and operate the Brinkerhoff I in areas of operations designated by ARII. In February, 1981, ARII directed BMD to move the barge to a lease concession operated by Hudbay. ARII and Hudbay executed an agreement for use of the barge in March, 1981, governing the drilling services to be performed by her on Hudbay's lease concession. Essentially, that agreement provided that BMD would perform drilling operations for Hudbay as instructed by ARII.

The crew of the Brinkerhoff I lived on board the vessel and rotated their time on and time off in two-week increments. They were shuttled between Indonesia and Singapore in the Airfast aircraft chartered by Hudbay under its contract with ARII. The crash occurred as members of the crew were returning to Indonesia enroute to the drilling barge. At the time of the crash, the aircraft was in contact with Indonesian air traffic controllers at Simpang Tiga Airport. Indonesian authorities subsequently investigated the crash and issued a report attributing it to pilot error and weather conditions. The crew and five of the thirteen passengers on the plane died in the crash; others were injured.

These actions are brought by or on behalf of ten of the passengers, all of whom were employed on the Brinkerhoff I at the time. All are brought under the Jones Act, 46 U.S.C. § 688, and most also allege claims under general maritime and California common law.

Four of the actions are brought on behalf of three American seamen:

> C-82-0836: brought on behalf of Max Sherill, a United States citizen and resident of New Mexico at the time of his death in the accident, by the administratrix of his estate, also a United States citizen and resident of New Mexico.
>
> C-82-2568: brought on behalf of James Owen, a United States citizen and resident of Minnesota at the time of his death in the accident, by the administratrix of his estate.
>
> C-83-0604: brought on behalf of Wm. Henry Craig, a United States citizen and resident of California at the time

of his death in the accident, by Ten Fong Craig, as administratrix of his estate.

C-83-1022: brought on behalf of Wm. Henry Craig, by his executor and heirs, United States citizens and residents of California.

The remaining actions are all brought by or on behalf of seamen none of whom was a citizen or resident of the United States:

C-82-2565: brought by Timothy Peter Jones, a British subject residing in Britain.

C-82-2566: brought by David Lowry, a citizen of Canada residing in Canada or Singapore.

C-82-2569: brought by Murray Robert Cole, a citizen of New Zealand residing in the Phillipines.

C-83-0603: brought by Shereen Zipfel, a citizen of Singapore, as administratrix of the estate of Ian Charles Zipfel, a British subject then residing in Britain or Singapore.

C-83-0605: brought by Chan Chuck Lee, a citizen and resident of Singapore.

C-83-0606: brought by Patrick Paul Grunke, a citizen and resident of Australia.

C-83-0607: brought by Vyner Gerard Albuquerque, a citizen and resident of Singapore.

II.

RECONSIDERATION

[1] The threshold question confronting the Court is whether to reconsider the prior denial of the motions by another judge. Plaintiffs argue that the denial is the law of the case and bars reconsideration. The Court is mindful of the institutional and policy considerations militating against reconsideration of an earlier ruling by a judge of the same

court. As a rule "the various judges who sit in the same court should not attempt to overrule the decisions of each other. . . ." *Castner v. First National Bank of Anchorage,* 278 F.2d 376, 379 (9th Cir.1960) (citing *Shreve v. Cheesman,* 69 F. 785, 791 (8th Cir.1895)). This rule is premised upon principles of comity and uniformity, and the need to preserve the orderly functioning of the judicial process. *Castner, supra,* 278 F.2d at 379-380. But it does not raise an absolute bar to reexamining questions previously determined. It is well established in this circuit that one district judge in a multi-judge court may modify or overrule an interlocutory order of another judge sitting in the same case for "cogent reasons" or where "exceptional circumstances" are presented. *Greyhound Computer Corp. v. IBM,* 559 F.2d 488 (9th Cir.1977), *cert. denied,* 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978); *United States v. Desert Gold Mining Co.,* 433 F.2d 713 (9th Cir.1970); *Tanner Motor Livery, Ltd. v. Avis, Inc.,* 316 F.2d 804 (9th Cir.), *cert. denied,* 375 U.S. 821, 84 S.Ct. 59, 11 L.Ed.2d 55 (1963); *Castner, supra.* Thus it makes no difference whether the interlocutory order is reconsidered by the same judge or by a different judge to whom the case has been reassigned. *United States v. Desert Gold Mining Co.,* 433 F.2d 713, 715 (9th Cir.1970).

In the prior order denying the motions, filed October 14, 1983, the court stated the issue to be "whether [it] should retain these cases and try them under the Jones Act, or whether plaintiffs should be remitted to appropriate proceedings elsewhere." (Order p. 1023) It then analyzed and discussed at some length the issue whether plaintiffs could maintain a claim under the Jones Act. The court concluded that "American law [applies] to all actions, and retain[ed] jurisdiction." It went on to add: "The Court does no more at this time than decide the choice-of-law question." (p. 1025) The motions to dismiss for forum non conveniens were, however, denied without further discussion. By order filed January 16, 1984, the court, pursuant to 28 U.S.C. § 1292(b), certified for an interlocutory appeal only this question; "What law, United States law (i.e. the Jones Act), or foreign law, applies to this matter." After further proceedings in which the court made certain additional findings

(by order filed October 29, 1984), the court of appeals denied the petition for an interlocutory appeal.

The status of these motions at this time, therefore, is that while the court denied them, a ruling from which no appeal was sought, it did not expressly decide the forum non conveniens issue. As plaintiffs themselves have said in a memorandum filed following the ruling: "While this Court did not expressly decide the *forum non conveniens* issue . . . it did deny the *forum non conveniens* motions." (Response of plaintiffs in opposition to defendants' joint motion for issuance of formal findings of fact to enable appeal to proceed, filed Sept. 5, 1984, p. 23)

Presumably the court considered itself bound by its ruling applying the Jones Act to all of these actions to deny the motions for forum non conveniens. As hereafter discussed, the Supreme Court's decision in *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981), not considered in the prior ruling, requires reexamination of the assumption on which the court acted.

[2] More importantly, the court made its ruling premised on the propriety of the so-called "global treatment" of all of these cases. The Ninth Circuit, however, undercut this premise in *Phillips v. Amoco Trinidad Oil Co.,* 632 F.2d 82, 89 (9th Cir.1980), *cert. denied,* 451 U.S. 920, 101 S.Ct. 1999, 68 L.Ed.2d 312 (1981), when it said:

> But the allegiance of the injured seaman has always been viewed as a relevant and important consideration in determining the appropriate law to apply. *We know of no authority for the view that foreign nationals may predicate a right to have American law applied on the rights of similarly situated American citizens.* The suggestion that one follows from another is another "variety of social jingoism, which presumes that the 'liberal purposes' of American law must be exported to wherever our multinational corporations are permitted to do business." (Emphasis added)

Cogent reasons therefore exist for reconsideration of the prior ruling.

III.

CHOICE OF LAW

[3] All plaintiffs bring their actions pursuant to the Jones Act, which states in part that "[a]ny seaman who shall suffer personal injury in the course of his employment, may ... maintain an action for damages at law, ..." 46 U.S.C. § 688. The Act applies to the death or injury of seamen occurring while being transported by their employer to or from the vessel. See e.g., *Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422, 433 (5th Cir. 1977) (Jones Act applied to seaman killed in crash of helicopter ferrying him from drilling rig). For purposes of these motions, the Court assumes that plaintiffs or their decedents were seamen for Jones Act purposes.

The choice of law rule which governs application of the Act was laid down in *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953), and *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970). The Court there identified the eight factors controlling the determination whether the Act applies: (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured party; (4) the allegiance of the defendant shipowner; (5) the place of the contract; (6) the inaccessibility of the foreign forum; (7) the law of the forum; and (8) the shipowner's base of operations.[1]

Lauritzen requires courts in applying these factors to compare the substantiality of this country's interest in a given action with that of other nations. Conflicts between competing laws are resolved by "ascertaining and valuing [the enumerated] points of contact between the transaction and the states or governments whose competing laws are involved." 345 U.S. at 582, 73 S.Ct. at 928. *Rhoditis* emphasized that application of the *Lauritzen* factors is not mechanical, but requires courts carefully to review and weigh each factor "in light of the

[1] *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959), extended the principles enunciated in *Lauritzen* to cases involving general maritime law.

national interest served by assertion of the Jones Act jurisdiction." 398 U.S. at 309, 90 S.Ct. at 1734.

Lauritzen and *Rhoditis* contemplated ocean-going vessels generally, true maritime vessels that ply the seas as an integral part of the shipping industry. As to these vessels, Gilmore and Black state:

> American law will . . . be applied in actions brought on account of injuries suffered on American-flag ships, whether the plaintiffs are American or foreign, resident or non-resident, seamen, harbor-workers, passengers, guests or, for that matter, pirates. By taking out registry in this country, the shipowner consents in effect to the application of the law of the United States. This proposition has seemed so self-evident that it appears never to have been questioned.
>
> G. Gilmore & C. Black, *The Law of Admiralty* at 477 (2d ed. 1975).

If the Brinkerhoff I were a traditional ocean-going vessel, so that the place of injury of any particular seaman would be fortuitous, the law of the flag would be of paramount importance. The rationale for this result rests "on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns [the ship]." *Lauritzen,* 345 U.S. at 585, 73 S.Ct. at 930. For the same reason, the allegiance of the shipowner and the shipowner's corporate base of operations are also significant factors under *Lauritzen* and *Rhoditis.* Defendants concede that if these factors were controlling, American law should be applied to all these actions.

[4] The relative value attached to these factors has undergone change, however, as they have come to be applied to drilling rigs. Such vessels differ from traditional ocean-going vessels in that they move comparatively infrequently and only over short distances. As a result the element of fortuity in the place where an accident occurs have been largely eliminated. *Phillips v. Amoco Trinidad Oil Co., supra,* 632 F.2d at 87; *Koke v. Phillips Petroleum Co.,* 730 F.2d 211 (5th Cir. 1984); *Bailey*

v. Dolphin International, Inc., 697 F.2d 1268 (5th Cir. 1983); *Vas Borralho v. Keydril Co.*, 696 F.2d 379 (5th Cir. 1983); *Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015 (5th Cir.) *reh'g denied*, 659 F.2d 1075 (5th Cir. 1981), *cert. denied*, 455 U.S. 1019, 102 S.Ct. 1714, 72 L.Ed.2d 136 (1982); *Zekic v. Reading & Bates Drilling Co.*, 536 F.Supp. 23 (E.D. La. 1981), *modified* 680 F.2d 1107 (5th Cir. 1982). In drilling rig cases, therefore, the place of the wrong, the domicile of the injured person and the place where the contract was made take on greater significance than other factors. *Phillips*, 632 F.2d at 87. For the same reason, the corporate base of operations is considered of less significance than the base of day-to-day operations. *Koke v. Phillips Petroleum Co.*, 730 F.2d at 220; *Vas Borralho v. Keydril Co.*, 696 F.2d at 389.

Plaintiffs argue that the Brinkerhoff I is more akin to a traditional blue water vessel than a fixed drilling rig, noting that she moves from drilling site to drilling site in various Far Eastern Seas.[2] In its order of October 11, 1983, the court observed that the Brinkerhoff I "appears to have been a stationary vessel rather than one that travelled the international

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[2] Plaintiffs also argue that the Ninth Circuit's order of June 21, 1984, denying interlocutory review, indicates that the Ninth Circuit considered the Brinkerhoff I as a traditional vessel rather than a drilling rig. The Ninth Circuit stated in part:

> [W]e do not have an adequate record for review. We note, for example, the lack of a finding on the question of the shipowner's base of operations, and the lack of clear evidence on the places where the contracts of employment may have been made. See generally *Hellenic Lines v. Rhoditis*, 398 U.S. 306, 308-09, 90 S.Ct. 1731, 1733-34, 26 L.Ed.2d 252 (1970). If the district court and the parties create a better record for review before the proceedings have continued so far as to discourage interlocutory action, we see no reason why the defendants may not request a certification for interlocutory appeal from the district court again.

This clearly was not a ruling on the vessel's status.

seas," but nonetheless considered the law of the flag a substantial factor.[3] The undisputed facts show that the Brinkerhoff I did not move under her own power, having to be towed by other vessels, and is described in the Certificate of Registry as a "barge." Although she was moved to various drilling locations in Indonesian and other South East Asian waters, she was not in any sense a traditional maritime vessel "plying the seas as an integral part of the shipping industry." *Chiazor, supra,* 648 F.2d at 1018. The drilling rig analysis applies to drilling vessels that remain stationary or move only infrequently and over short distances. *Nicol v. Gulf Fleet Supply Vessels, Inc.,* 743 F.2d 289, 297 (5th Cir. 1984). Between 1979 and February, 1983, the Brinkerhoff I operated at the following locations:

June 1979—Sept. 1979	—South China Sea
Sept. 1979—Nov. 1979	—Singapore Harbor
Nov. 1979—April 1981	—Java Sea
April 1981—June 1981	—Malacca Straits
June 1981	—to Singapore Harbor for ten days of repairs
June 1981—Feb. 1983	—Java Sea

This record shows that the Brinkerhoff I, while not at a single fixed location, spent long periods of time at only a few drilling locations in the general vicinity of Indonesia.

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[3] In its order of October 22, 1984, the court made the following additional findings of fact, without analysis, however, of their significance to the choice of law in these cases:

1. The place of the wrongful act is Indonesia.
2. The law of the flag is the United States.
3. The allegiance or domiciles of the injured parties are as follows: three of the plaintiffs are United States citizens. Of the remaining seven plaintiffs, two are citizens of Singapore and the others are domiciliaries of Canada, Australia, the United Kingdom and New Zealand.
4. The allegiance of the defendant shipowner is the United States.
5. The employment contracts were entered into "in foreign locations."
6. Foreign forums in either Singapore or Indonesia are accessible to the plaintiffs.
7. The law of the forum is American.
8. The relevant base of operations of the vessel Brinkerhoff I was either Singapore or Indonesia, or both. The overall base of the corporate shipowner defendant, BMD, was in San Francisco, California.

These undisputed facts and the court's prior findings viewed in the light of *Phillips, supra,* and the other cited cases, compels the conclusion that the Binkerhoff I was a drilling vessel for purposes of applying choice of law rules.

In its prior ruling denying the motions the court declined to follow *Phillips* because of the "presence of American plaintiffs" and the fact that "most of the remaining plaintiffs are English-speaking." (Order of Oct. 12, 1983, p.8). *Phillips,* however, does not turn on the fact that all of the plaintiffs were Trinidad citizens. It was because of the stationary character of the operation in which plaintiffs were injured or killed that the court of appeals gave controlling weight to the place of the wrongful act, the allegiance and domicile of the workers, the place of contract, and the base of the operation.

Nor is it relevant that all of the factors do not coincide in a single country. As the court held in *Bailey v. Dolphin International, Inc., supra,* 697 F.2d at 1277-78:

> It is certainly true that where the factors emphasized in *Chiazor* [and *Phillips*] all coincide in one country, the choice of law determination points strongly to the application of that country's law, but it does not follow that the application of American law is required, as if by default, when these factors are spread among several other foreign countries, and the only contact with the United States remains ultimate American ownership or control of the business ventures engaged in the drilling operation.

Further, the *Bailey* court specifically rejected the argument made by plaintiffs here that the involvement of several countries shifts greater emphasis to the place of ownership and base of operations. The court stated:

> [T]he substantiality of the base of operations factor or the law of the domicile of the ultimate owner, in an offshore drilling rig non-traditional maritime context, does not increase merely because the factors given added significance in *Chiazor* are spread among more than one foreign nation.
>
> *Id.*

See also *Martyn v. Transworld Drilling Company Ltd.*, No. 78-3423 (E.D.La. November 29, 1979), *aff'd* 619 F.2d 82 (5th Cir. 1980) (American law not applied where Irish citizen injured on American-owned drilling platform in the North Sea off the coast of the United Kingdom); *Zekic v. Reading & Bates Drilling Co., supra* (Italian, not American law, applied where Yugoslavian citizen injured in Italian territorial waters on American-owned drilling rig flying American flag.)

[5] Finally, as *Phillips* makes clear, the mere presence of American plaintiffs is not sufficient to entitle foreign plaintiffs to have the Jones Act applied to their cases. *Phillips, supra,* 632 F.2d at 89. A closely analogous decision is *In Re Ocean Ranger Sinking Off Newfoundland,* 589 F.Supp. 302 (E.D.La. 1984), involving consolidated actions arising from the sinking of the Ocean Ranger, an oil drilling vessel, off the coast of Newfoundland, Canada. American and Canadian crewmen died in the accident. Both the law of the flag and the "ultimate base of corporate operations" were American. The place of the wrongful act and the day-to-day base of operations were Canadian. The allegiance of the injured seamen and the place of the contract were divided between this country, as to those actions filed as a result of the deaths of American crewmen hired in America by American companies, and Canada, as to those actions filed as a result of the deaths of Canadian crewmen hired in Canada by Canadian companies. The court cautioned that this unique combination of choice of law factors mandated a result different from previous drilling rig cases. Specifically, the court concluded that American law applied to those actions filed as a result of the deaths of American crew members and Canadian law applied to those actions filed as a result of the deaths of Canadian crew members. The court explained its decision as follows:

> In the actions filed as a result of Canadian deaths, all four of the factors given added significance in the drilling rig context, allegiance of the seamen, place of the wrongful act, and day-to-day base of operations, point toward application of Canadian law. These factors are not outweighed by the fact that the law of the flag and the

> ultimate base of operations were American, especially in the drilling rig context. In the actions filed as a result of American deaths, two of the four factors given added significance in the drilling rig context, place of the wrongful act and day-to-day base of operations, point toward the application of Canadian law and the allegiance of the seamen, point toward application of American law. However, as to the actions filed as a result of American deaths, the fact that the law of the flag and the ultimate base of corporate operations were American does tip the balance in favor of applying American law.
> *Id.* at 320.

The court expressly rejected plaintiffs' argument that the Ocean Ranger drilling operation be viewed as a single "shipping transaction" "requiring one catholic choice of law determination." 589 F.Supp. at 320 n. 21. The court instead considered each crew member's employment as a maritime transaction for which a choice of law determination must be made. The court noted that "the appropriateness of this approach is evident from analysis of the multifactor *Lauritzen-Rhoditis* test itself, which contains two factors, allegiance of the seaman and place of the contract, that explicitly require individualized treatment." *Id.*

Plaintiffs here contend that the same choice of law should apply to all plaintiffs, whether American or foreign seamen. First, they argue that the "global solution" as to choice of law, employed by the court in *In Re Paris Aircrash of March 3, 1974,* 399 F.Supp. 732 (C.D.Cal.1975), applies here. Although plaintiffs there included domiciliaries of twenty-four nations, the court applied California law on damages to their consolidated claims. The case is of little relevance here, however, because the only issue in litigation was the amount of damages recoverable for a tort committed in California. The interest of California in having its damage law applied where the aircraft in suit was designed, constructed, manufactured and tested in California warranted uniform treatment of all claims.

Plaintiffs also rely on *Industrial Development Corporation v. Mitsui & Company,* 671 F.2d 876 (5th Cir. 1982) *vacated and*

remanded on other grounds, 460 U.S. 1007, 103 S.Ct. 1244, 75 L.Ed.2d 475 (1983), *rev'd and remanded,* 704 F.2d 785 (5th Cir.), *cert. denied,* ____U.S.____, 104 S.Ct. 393, 78 L.Ed.2d 337 (1983). That case holds merely tht the doctrine of forum non conveniens does not apply to actions under the Sherman Act and, even if it did, would not permit dismissal of such an action on the ground that a foreign country is a more convenient forum. Moreover, the court observed, requiring the same parties to litigate two suits in different forums would not be consistent with the doctrine. Here, of course, different parties would be involved in the various actions.

Plaintiffs also argue that the Shipowners Liability (Sick and Injured) Convention of 1936, 54 Stat. 1693, guarantees "equality of treatment to all seamen [injured on the high seas] irrespective of nationality, domicile or race." 54 Stat. 1700. Plaintiffs interpret this provision to mean that American law must apply to all foreign seamen serving on American-owned or American flag vessels. But this treaty does not give aliens access to American courts; it relates only to shipowners' liability for maintenance and cure of seamen. Norris, *The Law of the Seamen,* § 606, 605, 150-152 (3d ed. 1979). Further, such an interpretation would render nugatory the weighing of factors mandated by *Lauritzen* and Rhoditis. The Fifth Circuit criticized this argument in *In Re McClelland Engineers, Inc.,* 742 F.2d 837, 839 (5th Cir. 1984), *cert. denied,* ____U.S.____, 105 S.Ct. 1228, 84 L.Ed.2d 366 (1985), as "represent[ing] a candidly novel and clear departure from our holdings and those of the Supreme Court."

[6] The Court, therefore, concludes that settled law requires it to determine the applicable law with respect to each plaintiff in light of the relevant factors as they affect that plaintiff.

The factors entitled to the greatest weight in this case point to the application of foreign law here: as to each of the seamen, the place of the alleged wrongful act was Indonesia, the base of operations was Indonesia or, to a lesser extent, Singapore, and the employment contracts or other hiring arrangements were made in foreign locations.

[7] With respect to those plaintiffs or their decedents whose allegiance or domicile was foreign, these factors require a finding that the Jones Act does not apply to their actions.[4]

With respect to the four actions on behalf of three American seamen, the defendants do not dispute the applicability of the Jones Act and the Court so finds.

IV.

FORUM NON CONVENIENS

[8] The doctrine of forum non conveniens permits a court to decline to exercise its jurisdiction for prudential reasons. While the doctrine leaves much to the trial court's discretion, the principal relevant factors to be considered are well-established. They include, first, those relevant to the litigant's private interest: relative ease of access to sources of proof; availability of compulsory process for and the cost of obtaining the attendance of witnesses; possibility of a view of the premises; and other practical problems of conducting an expeditious and economical trial.

Second, there are factors bearing on the public interest; docket congestion of the court in which the action was filed; compelling jurors to serve on cases in which the community has no interest; the preference for having localized controversies decided at home; and the interest in having the action tried in the forum whose law will be applied. *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 507-9, 67 S.Ct. 839, 842-43, 91 L.Ed. 1055 (1947).

Because the Court has determined that the foreign seamen are not entitled to the application of American law while the American seamen are, their cases must be separately analyzed.

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[4] The Jones Act was amended on December 29, 1982, by Pub.L. 97-389, Title V, § 503(a), 96 Stat. 1955, adding a new subsection barring foreign seamen from maintaining certain actions under the Act or other United States maritime law. The legislation contains a "savings" clause providing that the new subsection will not apply to any actions arising out of an incident that occurred before the date of the amendment.

A. Foreign Seamen

1. Availability of an Alternative Forum

[9] "At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum." *Piper,* 454 U.S. at 254 n. 22, 102 S.Ct. at 265 n. 22. That the remedy in the alternative forum is less favorable to plaintiff is, under *Piper,* insufficient to warrant denial of the motion so long as it is reasonably adequate. Of course, an unfavorable change in the law may be a factor to be considered but it is not determinative unless the remedy is "clearly inadequate or unsatisfactory." *Id.* at 254, 102 S.Ct. at 265. It must be considered a relatively insignificant factor, in any event, in the cases of the foreign seamen.

[10] Defendants bear the burden of proving the existence of an adequate forum. *Cheng v. Boeing Co.,* 708 F.2d 1406, 1411 (9th Cir.1983). They have identified two alternative forums, Singapore and Indonesia. The court in its order of October 22, 1984, found both to be "accessible to plaintiffs."

With respect to Singapore, defendants have submitted statements by Helen Yeo of the Singapore law firm of Chor Pee and Company. In substance, she states that the courts of Singapore have jurisdiction over parties submitting to their jurisdiction which, under the Supreme Court of Judicature Act, may be by consent; that defendants may waive the statute of limitations; that discovery of documents and interrogatories are available but depositions are allowed only in certain circumstances; that witnesses may be subpoenaed within Singapore, and that Singapore permits third-party indemnity claims. (Reddick Decs.) Moreover, Singapore has adopted English common law with respect to claims for personal injury and English law generally with respect to air transport cases, and has a wrongful death statute. (McCloud Dec.)

In opposition, plaintiffs first submitted a declaration by Thomas Moon, an American lawyer who practiced with an American law firm in Bangkok for three years and then lived in Singapore for two years. Moon disputes that parties can waive the statute of limitations and lack of jurisdiction but cites no

authority. He notes that trial would be before a single judge, that contingent fees are prohibited, and that little discovery would be available. While he points out various disadvantages a plaintiff might suffer in a Singapore court, his statements are too vague, general and unsupported to be given much weight. Subsequently plaintiffs submitted a "draft response" to certain questions from Singapore solicitors; those responses appear to the Court to be substantially consistent with the representations made by defendants.

With respect to Indonesia, defendants have submitted statements by Makarim & Taire S, attorneys and counselors at law in Jakarta. They state that Indonesian and foreign parties may submit to the jurisdiction of Indonesian courts by written consent; that under the Indonesian Civil Code, defendants may waive the statute of limitations; that the court can compel the attendance of witnesses; and that third-party indemnity claims are permitted. Indonesian courts would apply Indonesian law, and remedies are available to employees and their survivors under Indonesia's Workmen's Compensation Law, under the Indonesian Civil Code for negligence, under the Indonesian Carriage by Air Act, and under the Warsaw Convention. (Reddick Decs.) Plaintiffs have made no significant counter-showing.

On the basis of the foregoing analysis of Singapore and Indonesian law, reinforced by the protective conditions of this order, the Court determines that either jurisdiction would offer a reasonably adequate alternative forum for plaintiffs.[5]

2. The Private Interest Interest Factors

Relative ease of access to sources of proof. Plaintiffs argue that there is no dispute that the air crash was caused by pilot error, and that the only questions before the Court are who controlled the vessel, who is responsible for selecting Airfast, and what amount of damages should be awarded. These

[5] The Court also takes judicial notice of Singapore's status as a major center of international trade and commerce and the base of operation in South East Asia for many corporations, American and foreign. This fact lends weight to defendants' assertion of its adequacy as an alternative forum.

questions do not require production of evidence located in Indonesia or Singapore.

Defendants, on the other hand, deny that negligence on the part of Airfast is established as the sole cause of the crash. While the report of Indonesian authorities who investigated the accident attributed the crash to pilot error and weather conditions, there appears to be evidence of negligence by the controllers who cleared the aircraft for landing despite adverse weather conditions and may have given an incorrect altimeter setting. Inasmuch as the cause of the crash is at the heart of the issues in this litigation, it is essential for the parties to have access to all relevant evidence.

It is not disputed that the operative facts on which liability and damages are premised occurred in Indonesia, and to a lesser extent, in Singapore. These include the maintenance and operation of the aircraft by Airfast, the chartering of the aircraft by Hudbay, and the actions of the crew and the Indonesian air traffic controllers. Eye-witnesses and other knowledgeable persons are located there. Records and physical evidence relating to the operation and crash of the aircraft, the activities of defendants, the injuries suffered by plaintiffs, and the post-accident investigation are also located there. It may be, as plaintiffs contend, that other evidence is scattered around the world, but none of it is shown to be located in this district. That the bulk of it is located in Singapore or Indonesia is demonstrated by plaintiffs' consolidated deposition notice which lists 33 named and countless other generically described persons as witnesses respecting the matters described above and notices their depositions to be taken in Toowoomba, Australia, Jakarta, Indonesia, and Singapore. (See Exhibit A, attached)

Availability of compusory process for and cost of obtaining the attendance of witnesses. No material witness has been shown to be subject to the process of this Court. To compel defendants to go to trial without access to the live testimony of critical witnesses would obviously be unfair. *Gilbert,* 330 U.S. at 511, 67 S.Ct. at 844. As heretofore discussed, most if not all of the material witnesses appear to be available either in Indonesia or in Singapore where their attendance may be compelled by subpoena or court order.

Plaintiffs' deposition notice reflects the dimensions which the trials of these cases are likely to assume. A large number of witnesses can be expected to be called and all or nearly all of them would have to be brought from Southeast Asia, if possible, at great expense. Thus, even with willing witnesses, trials in this district would be burdensome.

Jurisdiction over third-party defendants. If the cases are litigated in this district, defendants will not be able to acquire personal jurisdiction over Airfast or other potential foreign third party defendants, such as Indonesia, against whom indemnity claims would lie. Their ability to implead indemnitors in Indonesia and Singapore but not in this district is a factor militating in favor of dismissal. *Piper,* 454 U.S. at 259, 102 S.Ct. at 267.

3. The Public Interest Factors

The three principles underlying the public interest factors are summarized in *Pain v. United Technologies Corp,* 637 F.2d 775 (D.C. Cir. 1980), cited with approval by the Supreme Court in *Piper:*

> First, that courts may validly protect their dockets from cases which arise within their jurisdiction, but which lack significant connection to it; second, that courts may legitimately encourage trial of controversies in the localities in which they arise; and third, that a court may validly consider its familiarity with governing law when deciding whether to retain jurisdiction over a case. Thus, even when the private conveniences of the litigants are nearly in balance, a trial court has discretion to grant forum non conveniens upon finding that retention of jurisdiction would be unduly burdensome to the community, that there is little or no public interest in the dispute, or that foreign law will predominate if jurisdiction is retained. (citations omitted.) *Id.* at 791-92.

These actions brought by foreign seamen lack any significant connection with this forum. Unlike *Piper,* no issue is raised concerning the design or manufacture of a California-produced product, or, for that matter, concerning any California-based

activity.[6] While BMD's corporate base of operations is San Francisco, the day-to-day operations of the Brinkerhoff I were carried out in Indonesia and Singapore. California has no interest in these actions but Indonesia at least has a substantial one. These actions arise out of the crash of an Indonesian aircraft in Indonesian airspace under control of Indonesian air traffic controllers, subject to Indonesian regulations, and investigated and reported on by the Indonesian government. That they should be adjudicated by Indonesian courts seems entirely appropriate.

The Court also takes into account the adverse impact of protracted litigation such as this on its own docket and on the ability of local litigants to get to trial, and the burden imposed on local jurors required to sit on these actions.

Finally, the application of the law of Indonesia if the actions are tried there is consistent with that country's interest in the controversy and not inconsistent with the convenience of these plaintiffs.

"Because the central purpose of any *forum non conveniens* inquiry is to ensure the trial is convenient, a foreign plaintiff's choice [of forum] deserves less deference." *Piper, supra,* 454 U.S. at 256, 102 S.Ct. at 266. In this case, all of the relevant factors support the conclusion that the actions in this forum must be dismissed subject to appropriate conditions.

B. American Seamen

[11] The cases of the American seamen raise the question whether *Piper Aircraft Co. v. Reyno, supra* affects the disposition of forum non conveniens motions in Jones Act cases.

Several circuits have followed the rule that once a court has determined that the Jones Act applies to a case, that case should not be dismissed for forum non conveniens. *Needham v. Phillips Petroleum Co. of Norway,* 719 F.2d 1481, 1483 (10th Cir.1983); *Szumlicz v. Norwegian American Line, Inc.,* 698 F.2d 1192, 1195 (11th Cir.1983). *Fishter v. Ajios Nicolas V,*

[6] The fact that these actions arise out of conduct by Indonesians in Indonesia rather than out of design or manufacture of products in the United States makes them even stronger cases for transfer than *Piper*.

628 F.2d 308, 315 (5th Cir.1980), *cert. denied sub nom. Valmas Brothers Shipping S.A. v. Fisher,* 454 U.S. 816, 102 S.Ct. 92, 70 L.Ed.2d 84 (1981).

The Second Circuit has rejected that view. In *Cruz v. Maritime Co. of Philippines,* 702 F.2d 47 (2d Cir.1983), the court distinguished earlier circuit decisions on the ground that they had not involved forum non conveniens, and said:

> That portion of *Bartholomew* [*v. Universe Tankships, Inc.,* 263 F.2d 437 (2nd Cir.1959)] cited in *Antypas* [*v. Cia Maritime San Basilio, S.A.,* 541 F.2d 307 (2nd Cir.1976)] sets forth the general rule that "once federal law is found applicable the court's power to adjudicate must be exercised." *Id.* (emphasis added). The court in *Bartholomew* also recognized, however, that in "exceptional situations," such as where the abstention doctrine applies, the district court may dismiss despite the applicability of federal law. *See id.* A case involving forum non conveniens, like one involving abstention, presents just such an exceptional situation. See *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 504, 67 S.Ct. 839, 841, 91 L.Ed. 1055 (1947) quoting *Canada Malting Co. v. Paterson Steamship, Ltd.,* 285 U.S. 413, 422-23, 52 S.Ct. 413, 415, 76 L.Ed. 837 (1932).
>
> To summarize, when the Jones Act is applicable federal law is involved and the district court must exercise its power to adjudicate, absent some exceptional circumstances such as the application of the abstention doctrine or, as here, *the equitable principle of forum non conveniens.*

702 F.2d at 48 (emphasis added).

Under *Cruz,* therefore, the district court, on finding that the Jones Act applies, must adjudicate the case but adjudication encompasses the application in appropriate circumstances of the equitable doctrine of forum non conveniens.

The Ninth Circuit, in the recent decision in *Pereira v. Utah Transport, Inc.,* 764 F.2d 686 (9th Cir.1985), cited these cases and stated in dictum that it agreed with the Fifth, Tenth and Eleventh Circuits on the point that "a choice of law determination must be made before a district court dismisses a case under

forum non conveniens." (at 689) It did not address the specific issue whether, after *Piper,* a case subject to the Jones Act may be dismissed for forum non conveniens.

None of the decisions cited above considered the Supreme Court's decision in *Piper.* The Court there reversed a court of appeals decision on the ground that it had "erred in holding that plaintiffs may defeat a motion to dismiss on the ground of forum non conveniens merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum." 454 U.S. at 247, 102 S.Ct. at 261. *Piper* involved product liability actions by foreign plaintiffs against two American manufacturers arising out of an air crash in Scotland. The district court, after evaluating the *Gilbert* factors, had dismissed for forum non conveniens. Among other things, it had determined that Pennsylvania law would apply to the claims against one defendant and Scottish law to the claims against the other. The court of appeals rejected the district court's analysis and found that American law would govern all claims. It concluded that dismissal was not justified when it would result in a change in the applicable law unfavorable to plaintiffs.

The Supreme Court rejected the court of appeals' reasoning as inconsistent with *Gilbert* under which "dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice." 454 U.S. at 249, 102 S.Ct. at 262.

In recent decisions the Fifth Circuit recognized the possible applicability of *Piper* to Jones Act cases. In *De Oliveira v. Delta Marine Drilling Co.,* 707 F.2d 843, 845 (5th Cir.1983), the court said in dictum:

> We have held that, if United States law applies, a federal court should entertain the suit. *Fisher v. Agios Nicolaos V,* 628 F.2d 308, 315 (5th Cir.1980), *cert. denied sub nom., Valmas Bros. Shipping, S.A. v. Fisher,* 454 U.S. 816, 102 S.Ct. 92, 70 L.Ed.2d 84 (1981); *Volyrakis v. M/V ISABELLE,* 668 F.2d 863 (5th Cir.1982). *But see Piper*

> *Aircraft v. Reyno,* 454 U.S. 235, 257, 102 S.Ct. 252, 266, 70 L.Ed.2d 419, 437 (1981).

See also Koke v. Phillips Petroleum Co., supra, 730 F.2d at 218. Subsequently in *Ali v. Offshore Co.,* 753 F.2d 1327 (5th Cir.1985), the district court had dismissed an action raising both Jones Act and product liability claims after finding that the Jones Act did not apply, without considering the forum non conveniens factors. The court of appeals, after discussing *Piper,* remanded with directions to apply the *Gilbert* factors to determine whether the action should be retained or dismissed. The court said specifically:

> In applying the *Gulf Oil* test, the court should consider the *Gulf Oil* factors *both as they pertain to the Jones Act claims and the product liability claims.*

753 F.2d at 1333 (emphasis added).

In a footnote the court added:

> In contrast to the choice of law analysis rejected in *Piper* the choice of law decision in the Jones Act context is a relatively simple one and is an easy means of reaching a preliminary decision on the forum non conveniens issue. *Litigants remain free to demonstrate that, although United States law would apply, the full panoply of the Gulf Oil analysis leads to the conclusion that the United States forum is inconvenient.*

Id., n. 13 (emphasis added).

This statement, albeit dictum, strongly suggests that a Jones Act case may be dismissed for forum non conveniens. Inasmuch as it is found in that part of the opinion which dealt with the product liability claim, its full significance remains clouded.

Piper, of course, involved foreign plaintiffs but nothing in that decision suggests that the rule would be different for American plaintiffs. It is also true that it was a product liability action under state law, not a Jones Act case. *Piper,* however, inferentially rejected the notion that forum non conveniens does not apply to cases under the Jones Act. It did so by quoting the following statement from the Third Circuit's opinion which it reversed:

> [I]t is apparent that the dismissal would work a change in the applicable law so that the plaintiff's strict liability claim would be eliminated from the case. But . . . a dismissal for forum non conveniens, like a statutory transfer, "should not, despite its convenience, result in a change in the applicable law." Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified. [*Reyno v. Piper Aircraft Co.,*] 630 F.2d [149], at 163-164 [(1980)] (footnote omitted) (quoting *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 899 (CA3 1977), cert. denied, 435 U.S. 904, 98 S.Ct. 1449, 55 L.Ed.2d 494 (1978)).
>
> 454 U.S. at 246, 102 S.Ct. at 261.

DeMateos, on which the Third Circuit had relied, was in fact a case brought under the Jones Act in which the court upheld an order dismissing for forum non conveniens only after determining that the Jones Act did not apply.

The Supreme Court, therefore, clearly had before it the concept of forum non conveniens as it had been applied in Jones Act cases. Nevertheless it carved out no exception to its broad holding that

> The Court of Appeals erred in holding plaintiffs may defeat a motion to dismiss on the grounds of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum. The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.

454 U.S. at 247, 102 S.Ct. at 261.

Because the deceased seamen on whose behalf these actions were brought were Americans at the time of their death in the course of their duties, weight must be given to the Congressional purpose of affording a liberal remedy for injury or death of American seamen. Nothing in the statute itself,

however, bars dismissal of such a case for forum non conveniens. In addition a strong presumption attaches to the choice of forum by those plaintiffs who are residents of the United States, although the presence of American plaintiffs in and of itself is not sufficient to bar dismissal. *Cheng, supra,* 708 F.2d at 1411.

Piper instructs, however, that "the central purpose of any *forum non conveniens* inquiry is to ensure the trial is convenient . . ." *Piper, supra,* 454 U.S. at 256, 102 S.Ct. at 261. The relevant factors, which have been discussed in the preceding part of this opinion, demonstrate convincingly "that trial in the chosen forum would be unnecessarily burdensome for the defendant. . . [and] the court." *Id.* 454 U.S. at 256 n. 23, 102 S.Ct. at 266 n. 23. In reaching that conclusion, the Court takes into account also that these are not run-of-the-mill seamen's injury cases. These claims do not arise out of a typical maritime accident where the injury occurs on or about a vessel and the evidence is largely under the shipowner's control. Instead, they are analogous to foreign aircrash cases in which the relevant evidence is to be found abroad outside the control of the parties.

CONCLUSION

[12] The issue before the Court is whether trial in plaintiffs' chosen forum would be unnecessarily burdensome for defendants. Given the availability of reasonably adequate alternative forums, the relative ease of access to sources of proof in those forums, and the unavailability of compulsory process over any material witnesses, the expense of producing willing witnesses, the inability to acquire jurisdiction over third-party defendants, the lack of any significant connection of the actions and the burdens of a trial in this forum, private and public interest factors outweigh plaintiffs' forum preference, even in the four cases governed by American law.

In order that each plaintiff's interests will be adequately protected, the order dismissing these actions will become effective as to any defendant upon the filing with this Court

within 120 days from the filing of this order of a certificate on behalf of the defendant stating that:

1. Defendant has submitted to service of process and jurisdiction in whatever courts of Indonesia and Singapore any plaintiff shall have filed an action within ninety days from the date of filing of this order ("the new actions").

2. Defendant has formally and effectively waived any defense under the statute of limitations arising in any of the new actions which was not available at the time the instant actions were filed in this Court.

3. Defendant agrees to make available in any of the new actions witnesses (either for trial or for deposition) and documents within its control.

4. Defendant waives any objection to the use in any of the new actions of any product of discovery filed in the instant actions.

5. Defendant agrees to satisfy any final judgment rendered against it in any of the new actions.

This order shall become final (i) as to any defendant upon the filing by that defendant of the foregoing certificate in form satisfactory to the court or (ii) as to any plaintiff upon that plaintiff's failure to have filed a new action upon the expiration of ninety days from the date of filing of this order, whichever shall occur first.

The Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. The Court therefore certifies the following questions for interlocutory appeal:

1. Does the Jones Act apply to the actions brought by or on behalf of foreign nationals?

2. To the extent that the Jones Act applies to any of these actions, does it preclude conditional dismissal on forum non conveniens grounds?

IT IS SO ORDERED.

ORDER

[13] Defendant Dome Petroleum Corp. has moved pursuant to Cal.Code Civ.Pro. § 877.6 for a determination that the settlements entered into between Dome and plaintiffs are in good faith. After reviewing the papers filed by the parties and the record in these actions, and having heard argument on July 25, 1985, the Court made oral findings on the record that the settlements between Dome and the plaintiffs were made in good faith.

The question taken under submission was whether this Court could render such an order under § 877.6 in actions under the Jones Act and under general maritime law. The issue is whether the release and contribution rules under §§ 875 *et seq.* conflict with maritime law applicable to those actions.

Sections 875 *et seq.* are based on the premise that joint tortfeasors are jointly and severally liable to pay a judgment regardless of their comparative fault, that a tortfeasor who has discharged a judgment is entitled to contribution from other defendants liable for the judgment, that a defendant who has settled is not thereby immune from liability in the absence of an order under § 877.6, and that the amount a plaintiff is entitled to collect on a judgment will be reduced only pro tanto by the amount he has received from settlements with other defendants.

Whether these rules would be applied to Jones Act cases in the Ninth Circuit is not known. The Court has discovered no cases which address these questions sufficiently comprehensively to enable one to make a judgment whether a potential conflict exists with the California statute.

In *Edmonds v. Compagnie General Transatl,* 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979), the Supreme Court stated that it considered the general rule in maritime law to allow "an injured party to sue a tortfeasor for the full amount of damages for an indivisible injury that the tortfeasor's negligence was a substantial factor in causing, even if the concurrent negligence of others contributed to the incident." *Id.* at 260, 99 S.Ct. at 2756. Nonetheless some courts have entered judgments in multi-defendant Jones Act cases apportioning responsibility

among defendants. This practice appears to be approved at least in the Fifth Circuit. *See Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154 (5th Cir.1985); *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir.1979). It was also followed in one reported case in this District by Judge Poole. *Kizer v. Peter Kiewit Sons' Co.*, 489 F.Supp. 835 (1980). Pre-judgment apportionment of liability for damages based on comparative fault eliminates the need for contribution since no defendant would ever have to pay more than its share. Cf.*Loose v. Offshore Navigation, Inc.*, 670 F.2d 493, 500-501 (5th Cir.1982) (decision concerns indemnity which differs from contribution; the former transfers responsibility while the latter simply divides it). Hence, if this procedure were followed, the procedure under §§ 875 *et. seq.* would be rendered irrelevant.

Another alternative open to the courts would be to adhere to the conventional rule of joint and several liability but to reduce plaintiff's recovery from a judgment debtor not by the amount collected from settlements, but by the amount of damage liability allocable to other defendants on the basis of comparative fault. The authority for this approach is sparse, if it exists at all in maritime cases. *See Donovan v. Robbins,* 752 F.2d 1170, 1180 (7th Cir.1984). The much cited footnote 5 in *Doyle v. United States,* 441 F.Supp. 701, 710 (D.S.C. 1977), which explains and advocates it, is largely unsupported. It conflicts, of course, with the approach under the California statute (§ 877), derived from the Uniform Contribution Among Tort Feasors Act (§ 4), under which the liability of a joint tortfeasor is reduced only by the amount received by plaintiff from settlement.

This brief and admittedly superficial glance at the law satisfies the Court that the possibility of a conflict with existing Jones Act law is sufficiently remote not to constitute an obstacle to application of § 877.6 here. Whether ultimately a claim for contribution by other defendants in these actions may come before some court is a matter of speculation. If it does, it will be for that court, wherever it may be, to adjudicate the rights and liabilities of the defendants inter se. Even the question of reduction of any plaintiff's judgment lies in the distant future. Hence any views expressed by this Court in the matter would be pure dictum.

For these reasons, the Court is satisfied that there is at this time no ground for declining to exercise its power under § 877.6 to determine the settlements to have been made in good faith and it hereby does so for the reasons stated orally on the record of the hearing. The consequences of this ruling are left to be determined another day.

IT IS SO ORDERED.

EXHIBIT A

July 19, 1984

NOTICE OF INTENT TO TAKE ORAL DEPOSITIONS

To: *Defendants,* BRINKERHOFF MARITIME DRILLING, INC., BRINKERHOFF MARITIME DRILLING, S.A. and BRINKERHOFF MARITIME DRILLING PTE, LTD., by and through their attorney of record, Mr. Rex M. Clack of Derby, Cook, Quinby & Tweedt, 333 Market Street Suite 2800, San Francisco, California 94105.

To: *Defendants,* ATLANTIC RICHFIELD CO. AND ARCO OIL & GAS COMPANY by and through their attorney of record, Mr. James M. Derr of Belcher, Henzie, Biegenzahan, Chertok & Walker, 333 South Hope Street, Suite 3650, Los Angeles, California 90071.

To: *Defendants,* HUDBAY OIL (MALACCA STRAIT) LTD., HUDBAY OIL (INDONESIA) LTD. and DOME PETROLEUM CORP.. by and through their attorney of record, Mr. Moris Davidovitz of Maloney, Chase, Fisher & Hurst, 4 Embarcadero Center, San Francisco California 94111.

To: *Defendant,* HALLIBURTON COMPANY, by and through its attorney of record, Mr. Grayson S. Staring of Lillick, McHose & Charles, Two Embarcadero Center, San Francisco, California 94111.

To: *Defendant,* MCCLELLAND ENGINEERS, INC., by and through its attorney of record, Mr. Harold Albert Stone of Gudmunson, Siggins & Stone, Russ Building, Suite 710, 235 Montgomery Street, San Francisco, California 94104

To: *Defendant,* OCEANEERING INTERNATIONAL, INC., by and through its attorney of record, Mr. Vernon L. Goodin of Bronson, Bronson & McKinnon, 555 California Street, San Francisco, Caifornia 94104.

To: *Defendant,* CONOCO, INC., by and through its attorney fo record, Mr. Robert J. Finan of Finan, White & Morrison, 333 Broadway, Suite 200, San Francisco, California 94133.

PLEASE TAKE NOTICE that pursuant to Federal Rules of Civ Procedure 30(b)(6), the Plaintiffs, by and through their attorney of record, BENTON MUSSLEWHITE, will take the oral deposition, before an officer authorized to administer oaths of the following witnesses:

a. Dr. Michael N. Fox, M.A.P.S., M.A.S.G.P.P. (U.S.), psychologist;

b. Rael Duffie, Psysiotherapist;

c. Kerrie Dixon of International Rehabilitation Associates;

d. Dr. Bookles;

e. Custodian of records and treating physicians or rehabilitation specialist from the Connolly Street Rehabilitation Center, Perth, Western Australia;

f. Sir George Bedbrook, treating physician;

g. Custodian of the records and accounts of Saint John of God Hospital, Subiaco;

h. Dr. E.G. Griffiths;

i. Custodian of records and accounts of Royal Perth Rehabilitation hospital;

j. Jim Croft, barge foreman, who is Australian, if located, can be arranged in Australia;

k. The depositions of friends, acquaintances and relatives of Grunke who knew of him both before and after the accident;

l. Patrick Paul Grunke, himself;

m. Mr. R. D. McKellar-Hall and Mr. N. J. Bedolin

Said depositions will commence at 10:00 A.M. on Monday, October 15, 1984 and will continue on Tuesday, October 16, 1984 Wednesday, October 17, 1984 and Thursday, October 18, 1984 at the office of Patrick Nunan of CLEARLY & LEE, 2 Russell Street, Toowoomba, Australia and other places designated thereafter.

On Monday, October 22, 1984, beginning at 10:00 A.M., in Jakarta, Indonesia at the Jakarta Hilton Hotel, and continuing on Tuesday, October 23, 1984, Wednesday October 24, 1984, and Thursday, October 25, 1984 at other places designated thereafter, the depositions of the following witnesses will be taken:

a. Custodian of the records and principal investigator of the investigating authorities of Indonesia who investigated the air crash in question;

b. Any witness who lived in and around the site of the crash in Pekanbaru, Indonesia;

c. The individuals who were present in the control tower and/or control room at the time of the attempted landing by the aircraft in question;

d. The Air Controllers at Pekanbaru Airport;

e. Any and all officers or representatives of PT Airfast Services Indonesia;

f. Mr. E.C. Andrews, President of PT Airfast Services Indonesia;

g. Mr. T.E. Steen, General Manager of PT Airfast Services Indonesia;

h. Florence C. Forrester (if found in Indonesia):

i. Mr. A. S. Clark, Contracts Manager of Airfast Services Indonesia;

j. Tony Clark of the Jarkarta office of PT Airfast Services Indonesia;

k. R. G. Sawka of Hudbay Oil (Malacca Atrait) Ltd. in Jakarta;

l. Custodian of the records and principal officer or person with knowledge with the Indonesian government which certifies and authorizes flights into Indonesia by commercial aricraft (the equivalent of the CAB and National Transportation Safety Board in the United States);

m. Don Burgland, Neal Craig, Ron Panas, Ian Scott, Jim Croft, all members of the shifts of the crews at the time of the accident in question;

n. Custodian of records and accounts of the hospitals in Pekanbaru and/or Jakarta in which any of the Plaintiffs were sent for care and treatment;

o. All doctors who treated all Plaintiffs in Pekanbaru and/or Jakarta;

p. The custodian of the records and principal authority who issued the death certificates;

q. The principal and operating manager in Jakarta and/or Pekanbaru or any other location in Indonesia of the following companies; Brinkerhoff Maritime Drilling Corporation, any foreign subsidiary of Brinkerhoff Maritime Drilling Corporation, or subsidiary that has an office in the Far East; Hudbay Oil (Malacca Strait) Ltd. and any other sister companies or subsidiaries of the Hudbay group of companies that have offices in the Far East, particularly Indonesia; Atlantic Richfield Indonesia, Inc., and all other Atlantic Richfield Indonesia, Inc., and all other Atlantic Richfield companies who may have offices in the Far East, particularly Indonesia; Oceaneering International, Inc., and all of its subsidiaries or sister companies who have offices in the Far East, particularly in Indonesia; McClelland Engineers, Inc., and any of its subsidiaries or related companies who have offices in the Far East, particularly in Indonesia; Halliburton Industries, Inc., or any of its subsidiaries or related companies that have offices in the Far East, particularly in Indonesia;

r. Caltex Hospital in Pekanbaru or Jakarta.

On Monday, October 29, 1984, commencing at 10:00 A.M. in Singapore at the Singapore Shangai La Hotel, and continuing on Tuesday October 30, 1984, Wednesday, October 31, 1984, Thursday, November 1, 1984 and Friday, November 2, 1984 at other places designated thereafter, the depositions of the following witnesses will be taken;

a. Chan Luck Chee (if wanted by Defendants);

b. Vyner Albuquerque (if wanted by Defendants);

c. Mrs. Shereen Ramona Zipfel (if wanted by Defendants);

d. Mrs. Ten Fong Craig (if wanted by Defendants);

e. Dr. C. M. Ling;

f. The custodian of the records and accounts of Mount Elizabeth Hospital;

g. All witnesses named above in connection with Jakarta and Pekanbaru, Indonesia who are present in Singapore rather than Indonesia, including but not limited to the various Corporate representatives of the Defendant corporations and their subsidiaries or related companies; investigative authorities; representatives and officers of PT Airfast of Singapore as well as PT Airfast Indonesia; members of the crew of the BRINKERHOFF I at the accident in question on either shift;

h. All officers of the Defendant corporations and their subsidiaries and/or related companies, as named above, whose office is in Singapore and who is the managing officer of those particular offices;

i. All investigate authorities of Singapore who may have investigated the crash in question;

j. All authority of Singpore who may have issued licenses and/or renewed licenses with respect to commercial operation of aircraft in or out of Singapore;

k. Mr. Dave Lowry;

l. Mr. Larry Coe;

m. Dr. Freddie B. T. Chew;

n. Custodian of accounts and records at Saint Mark's Hospital in Singapore;

o. Custodian of records and accounts at Mount Alverina Hospital;

p. Dr. Loong Si Chin;

q. J. Peter Gemeinhardt of McClelland Engineers, S.A.;

r. Person in charge of maintenance of PT Airfast planes at Seletar Aiport in Singapore;

s. Rod Stanley of Oceaneering;

t. Keith Manson of Oceaneering;

u. Dr. N. Knunaratnam;

v. Custodian of records and accounts at Singapore General Hospital, Singapore;

w. Dr. R. Sundarason;

x. Any other witnesses or persons who were on board the PT Airfast plane that crashed who reside in Singapore, and any other witnesses or persons who worked in supervisory or responsible capacities on board the BRINKERHOFF I during the period of time that the accident in question occurred;

y. Any other doctors or hospitals in which any of the Plaintiffs might have been treated not mentioned above and who are located in Singapore.

z. Various friends, acquaintances and relatives of the decedents and Plaintiffs who knew the Plaintiffs and who are located in Singapore.

Plaintiff requests that all of the above witnesses bring all documents which pertain to the matters mentioned in connection with the Notice of Depositions and all documents that may have any connection with the accident in question, either directly or indirectly.

You are invited to attend and cross-examine.

Respectfully submitted,
LAW OFFICES OF BENTON MUSSLEWHITE, INC.

BY: /s/ BENTON MUSSLEWHITE
Benton Musslewhite

BY: /s/ JOHN O'QUINN
John O'Quinn

BY: /s/ LYLE C. CAVIN, JR.
Lyle C. Cavin, Jr.

28 USC § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 USC § 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

46 U.S.C. § 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure for damages for the injury or

death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred—

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources—including but not limited to drilling, mapping, surveying, diving, pipe-laying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person—

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

NO. 87-1122

*

IN THE
SUPREME COURT OF THE UNITED STATES

*

OCTOBER TERM, 1987

*

CROWLEY MARITIME CORPORATION, et al.,
Petitioners,

versus

SHEREEN RAMONA ZIPFEL, et al.,
Respondents.

*

BRIEF SUGGESTING THAT THE PETITION BE HELD IN ABEYANCE AS TO PETITIONERS' FIRST GROUND AND BRIEF IN OPPOSITION TO PETITIONERS SECOND GROUND FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

*

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Attorneys for Respondents

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

I.

Whether - in view of the fact that this Court has already granted certiorari in ***Chick Kam Choo, et. al. v. Exxon Corp., et al.***, No. 87-505, Supreme Court, cert. granted, 108 S.Ct. 343 (Nov. 16, 1987), Ct of Appls, 817 F.2d 308 (5 Cir. 1987), a case which conflicts with the holding of the Court of Appeals in this case that a federal district court, which has dismissed a maritime case on ground of forum non conveniens, is precluded by the Anti-Injunction Statute, 28 U.S.C. 2283, from enjoining a state court in which the same case has been subsequently filed, from adjudicating the case; oral arguments in ***Chick Kam Choo*** are scheduled for March; and Petitoners in ***Chick Kam Choo*** have agreed to allow Petitoners in this case to file an amicus curae brief in ***Chick Kam Choo*** - it would be in the interest of judicial economy and justice to defer

decision on the first question presented for review in this case, pending this Court's decision in *Chick Kam Choo*?

II.

As to the second reason given by Petitioners for granting certiorari, whether - in view of the fact that the assertions in the two cases (*In re Air Crash Near New Orleans, Louisiana*, 821 F.2d 1147, 1164 n.25 [5 Cir. 1987] and *Cruz v. Maritime Co. of Philipines*, 702 F.2d 47 [2 Cir. 1983]) which Petitioners cite as being in conflict with the Court of Appeals holding in this case that the application of the Jones Act, 46 U.S.C. 688, deprives the district court of the discretion to dismiss the case on grounds of forum non conveniens, constitute nothing more than dicta and, in any event, the opinion of the Court of Appeals on that issue is clearly correct - it would be appropriate to grant certiorari in this case?

PARTIES BELOW

The parties to the proceedings below were

Plaintiffs:

Shereen Ramona Zipfel, Individually and as Administratrix of Ian Charles Zipfel, deceased; Ten Fong Craig, Individually and as Administratrix of the Estate of William Henry Craig, deceased; Chan Luck Chee; Vyner Gerard Albuquerque; and Patrick Paul Grunke.

Defendants:

Crowley Maritime Corporation; Brinkerhoff Maritime Drilling Corporation; Brinkerhoff Maritime Drilling Corporation S.A.; Brinkerhoff Maritime Drilling Corporation PTE, Ltd; Conoco, Inc.; Halliburton Company; Atlantic Richfield Company; Arco Oil & Gas Corp.; McClelland Engineers, Inc.; and Oceaneering International, Inc.

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IN THE
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OCTOBER TERM, 1987

*

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

*

BRIEF SUGGESTING THAT THE PETITION BE HELD IN ABEYANCE AS TO PETITIONERS' FIRST GROUND AND BRIEF IN OPPOSITION TO PETITIONERS SECOND GROUND FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents respectfully request that point one of the Petition be held in abeyance and that the Petition be denied as to point two.

OPINIONS BELOW

The Petition adequately sets forth the opinions below.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

The Petition adequately sets forth the statutes involved.

STATEMENT OF THE CASE

The Respondents agree with the Statement of the Case by Petitioners (Petition at pp. 2-4) except insofar as it fails to contain or conflicts with the following:

1. While the district court found that the base of operations of the Brinkerhoff I was in the Far East, there was substantial evidence that decisions directly and indirectly affecting its operation were repeatedly made in San Francisco and Los Angeles.

2. It was undisputed that the owner and operator of the Brinkerhoff I was Brinkerhoff Maritime Drilling Corporation ("BMDC"), an American Corporation with its

home office and corporate base of operations in San Francisco.

3. It was further undisputed that the Brinkerhoff I flew the American flag and its home port was San Francisco. In addition, it had a sailing history of moving from American waters to various and changing locations in the South China Sea, Java Sea and Malacca Straits.

4. It was undisputed that two of the five seamen involved in these cases, Grunke (Australian) and Craig (American), were directly employed by BMDC and, while the other three, Zipfel (English), Chee (Singaporean) and Albuquerque (Singaporean), were nominally employed by subsidiaries of American corporations, there was a fact issue as to whether Zipfel, Chee and Albuquerque were the de-facto employees of BMDC because of its ultimate control over the vessel on which

they were serving.[1]

5. The Brinkerhoff I was drilling pursuant to a contract between BMDC and Atlantic-Richfield Indonesia, Inc. ("ARII"), an American corporation with its home office in Los Angeles, which provided that all disputes arising out of the Brinkerhoff I's activities would be decided under American, "California, U.S.A." law; the seamen plaintiffs and decedents were third-party beneficiaries of such choice-of-law clause.

6. The place of crash and injury, on land in Indonesia, was fortuitous; the trip during which the plane crashed proceeded over land in Singapore, thence over international waters, and thence over land in Indonesia.

7. The district judge who first presided over the cases in the district court,

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1. See ***Spinks v. Chevron***, 507 F.2d 216 (5 Cir. 1975) and ***Baker v. Raymond International, Inc.***, 656 F.2d 175 (5 Cir. 1988).

Aguilar, J., after extensive briefing and argument, held that the Jones Act applied to *all* of the seamen who were serving on the Brinkerhoff I and who were injured or killed in the crash; interlocutory appeal, though certified on the choice-of-law question by Judge Aguilar, was twice declined by the Ninth Circuit; as the cases were being prepared for trial on the merits and almost two years after they were filed, they were transferred to Schwarzer , J, who, despite Respondents vigorous contentions that Judge Aguilar's ruling on the applicability of the Jones Act was the "law of the case", reversed Judge Aguilar on the applicability of the Jones Act to the foreign seamen; and that holding of Judge Schwarzer was affirmed by the Court of Appeals.

8. The Texas state court actions of the plaintiffs were filed almost simultaneously wth the filing of the federal actions and were allowed to remain

dormant through a mutual understanding among counsel for the parties (that the state court suits would not be activated until after the federal district court decided whether it would accept jurisdiction).[2]

9. As we argue below, the decisions in *In Re Air Crash Disaster Near New Orleans, Louisiana*, 821 F.2d 1147, 1164 n.25 (5 Cir. 1987) and *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47 (2 Cir. 1983), do not truly conflict with the decision of the Court of Appeals in this case - that the application of the Jones Act precludes dismissal on grounds of forum non conveniens - because the language employed by the courts of appeals in those cases

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2. One of the important reasons why suits were filed in the Texas state court is that the home offices of the parent corporations of the nominal subsidary employers of Zipfel, Albuquerque and Chee (Halliburton Company, Oceaneering International, Inc. and McClelland Engineers, Inc., respectively) were *all* in Texas.

was clearly dicta and the issue decided by the Court of Appeals in this case was *not* an issue that was squarely before the *New Orleans Air Crash* and *Cruz* courts and was not an issue, the resolution of which was necessary to a disposition of those cases.

Reasons Why The Court Should Defer Deciding Whether To Grant Certiorari On The Injunction Question And Should Deny Certiorari On The Jones Act/Forum Non Conveniens Issue.

A. We Respectfully Request and Suggest That The Court Should Defer Deciding Whether To Grant Certiorari On The Injunction Question Until After The Court Has Decided *Chick Kam Choo v. Exxon*, No. 87-505, Supreme Court, cert granted 108 S.Ct. 343 (Nov. 16, 1987), Ct of Appls, 807 F.2d 307 (5 Cir. 1987).

In the *Chick Kam Choo* case pending in this Court, Petitoners Brief has already been filed and the parties have been notified that oral argument will probably take place in March of this year.

Obviously, it would not serve the interests of justice or an economy of justice to grant certiorari in this case on the injunction question and either have two separate presentations of the issue before the Court or delay the determination of the ***Chick Kam Choo*** case so that ***Zipfel*** could be consolidated with ***Chick Kam Choo.*** We respectfully suggest that this would be an appropriate case in which to defer consideration of the Petition filed herein, particularly on the injunction question, until ***after*** the Court has decided the ***Chick Kam Choo*** case.

The Petitioners in this case could in no way be prejudiced by such deferral, particularly since they have requested consent from the Petitioners and Respondents in ***Chick Kam Choo*** to file an amicus curiae brief in ***Chick Kam Choo***, and both parties have consented. Thus, the Petitioners in this case will have the opportunity to present to this Court their views on the injunction question.

B. As to the Jones Act/Forum Non Conveniens Issue, Certiorari Should Be Denied.

The holding of the Court of Appeals that the application of the Jones Act compels the district court to deny a forum non conveniens motion is not one concerning which certiorari should be granted for these important reasons: First, there are no true conflicts among the circuit courts with regard to "decisions", as distinguished from dicta, on the issue. Second, a resolution of the issue will have no precedential value. Third, the Court of Appeals clearly decided the issue correctly.

1. There is no true conflict among the circuit courts.

The Petitioners assert that certiorari should be granted primarily because of a perceived "conflict" between the decision of the Court of Appeals in this case and the dicta of the courts of appeals in *In*

Re Air Crash Disaster Near New Orleans, Louisiana, 821 F.2d 1147, n.25 (5 Cir. 1987), and *Cruz v. Maritime Co. of Phillipines*, 702 F.2d 47 (2 Cir. 1983) and with an alleged innuendo of this Court in *Piper Aircraft Corp. v. Reyno*, 654 U.S. 235 (1981).

The Court of Appeals below squarely held that the district court had erred in dismissing the claim pertaining to the American seaman on ground of forum non conveniens because, since the Jones Act, 46 U.S.C. 688, applied to the American seaman's claim, "dismissal for forum non conveniens is precluded." A19-A23. That holding was absolutely indispensable to the result reached - without that holding, as the Court of Appeals observed, the dismissal by the district court of the American seaman's claim on ground of forum non conveniens could very well have been upheld. A19, A20.

But, in *Cruz* and *In Re Air Crash Near New Orleans*, the gratuitous observations that a district court is free to dismiss a seaman's case on ground of forum non conveniens even though the Jones Act applies to the case were totally irrelevant to the result reached. In *Cruz*, a **per curiam** decision, the Jones Act had been found not to apply and, therefore, the discussion as to whether or not the application of the Jones Act precludes a dismissal on grounds of forum non conveniens, 702 F.2d at 48, had absolutely no possible bearing upon the result reached. See Comments in **Edelman**, 15 Jl. of Maritime Law and Commerce 517, 530 (1984).

And the comments of the Fifth Circuit in *Air Crash Near New Orleans* are truly shocking. After seven years and at least eighteen decisions in the Fifth Circuit alone, the Circuit - without the question being in issue, apparently

without it being briefed or argued, without the interests of maritime plaintiffs or defendants being a party or in any way represented - resorted to a mere footnote in a case involving an aircrash on land and not related to maritime rights or the Jones Act in any way, in which to sweep away those seven years and eighteen cases of solid and consistent authority to the effect that a federal court has no discretion to dismiss a case on grounds of forum non conveniens when the Jones Act applies. See Ftnt. 25 at p. 1163, 1164 and the listing of maritime cases which were summarily stated to be overruled. Not only was the infamous footnote 25 rank dicta but it seems inherently improper to choose a non-maritime case in which to attempt such a radical departure from past precedent.

Lastly, the petitioners' reference to *Piper Aircrart v. Reyno*, 454 U.S. 235 (1981), Petition at 13, 14, centers upon

the discussions by the district court in this case of ***Piper***, A-53 to A-58, and its very strained view that ***Piper*** "inferentially rejected the notion that forum non conveniens does not apply to cases under the Jones Act", A-56, A-57, because of the ***Piper*** Court's rejection of a quote in the Court of Appeals opinion (630 F.2d at 163-164), which had in turn quoted from a Jones Act case, ***DeMateos v. Texaco, Inc.***, 562 F.2d 895, 899 (3 Cir. 1977), cert den., 435 U.S. 904 (1978). This view, it seems clear, is entirely wrong because it ignored the clarification sentence which immediately followed the referred-to quote, such sentence making it perfectly clear that this Court's rejection of the Third Circuit quote was based upon the conclusion that, in a land-based aircrash, plaintiffs may not automatically "defeat a motion to dismiss on the ground of forum non conveniens merely by showing that the substantive law

that would be applied in the alternative forum is less favorable to the plaintiffs, than that of the present forum". 454 U.S. at 246, 247. The law involved in *Piper* was the common-law of Scotland. The *Piper* case did *not* address, directly or indirectly, the issue decided by the Court of Appeals in this case: whether, if a federal statute containing special venue provisions applies to the case, a federal court is nevertheless authorized to disregard such Congressionally enacted special venue provisions and dismiss the case on the basis of the common-law doctrine of forum non conveniens.

We submit that the dicta in *Cruz* and *In Re Air Crash Near New Orleans* and the alleged "inferential" expressions in *Piper* are not "decisions" at all and certainly not the kinds of "decisions" that produce the kind of "conflicts" which would justify the granting of certiorari.

Supreme Court Rule 19(1), 28 U.S.C.A., defines and delimits those situations in which the Court will grant certiorari and the Rule describes the one assertedly applicable here as when "a court of appeals has rendered a decision (not a dicta) in conflict with the decisions (not dicta) of another court of appeals on the same matter." id. As far back as 1897, the Court discussed its certiorari power as one that "will be sparingly exercised" and "only" where it is clear that the case is one that is appropriate for certiorari intervention. *Forsyth v. Hammond*, 166 U.S. 506, 513-515 (1897). Indeed, this Court has dismissed a writ of certiorari previously granted on the ground that the court of appeals decision conflicted with the decision of another court of appeals when it was determined that in fact a conflict did not truly exist. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959). And a reading of typical cases in

which the Court has granted certiorari on the basis of conflicts amoung the circuit courts or a circuit court conflict with decisions of the Supreme Court demonstrates that the "conflicts" which this Court deemed sufficient for the invocation of certiorari jurisdiction were direct and true conficts upon the merits of the ultimate issue and not conflicts involving dicta or inferential language. See e.g. ***Buffaloe Forge Co. v. United Steelworkers of America***, 428 U.S. 397, 404 (1976); ***U.S. v. ITT Continental Baking Co.***, 420 U.S. 223, 225 (1975); and ***Marks v. U.S.***, 430 U.S. 188 (1977).

In fact, there is no conflict at all among the court of appeals' cases in which the question of whether the application of the Jones Act compelled retention of jurisdiction directly affected the outcome of the case and the decision reached. See ***Antypas v. Cia Maritime San Basilio, S.A.***, 541 F.2d 307 (2 Cir. 1976), cert den. 429

U.S. 1098 (since Jones Act held to apply, "a district court has no power to dismiss on grounds of forum non conveniens", id. at 310); ***DeMateos v. Texaco, Inc.***, 562 F.2d 895 (3 Cir. 1977), cert den. 435 U.S. 904 (dismissal of maritime case on grounds of forum non conveniens proper because Jones Act did not apply; ". . . we conclude that the district court, recognizing that American law would not apply, was justified in dismissing the complaint because the Eastern District of Pennsylvania is an inappropriate forum"; id.. at 899-903); ***Fisher v. Agios Nicolaos V***, 628 F.2d 308 (5 Cir. 1980), cert den. 454 U.S. 816 (since Jones Act applied, court had no discretion to dismiss on grounds of forum non conveniens; ". . . for similar forum non convenens reasons, if United States law is applicable, the American court should retain jurisdiction rather than relegate the controversy to a foreign tribunal;" id. at 315, 317, 318);

DeOlivera v. Delta Marine Drilling Co., 707 F.2d 843, 845-847 (5 Cir. 1983)(reversing holding of district court that Jones Act applied and, only because Jones Act did *not* apply, thence ordered dismissal on grounds of forum non conveniens; ". . . if United States law applies, a federal court should entertain the suit"; id. at 845); *Ali v. Offshore Co.*, 753 F.2d 1327 (5 Cir. 1985)(reversed because district court, in dismissing on grounds of absence of subject matter jurisdiction, erred in failing first to directly consider whether the Jones Act applied, and if it found that the Jones Act did not apply, then, and only then, consider whether to dismiss on grounds of forum non conveniens; id. at 1330, 1334); *James v. Gulf International Marine Corp.*, 731 F.2d 886 (5 Cir.1984), subs. dec. 777 F.2d 193 (5 Cir. 1985)(reversed because the district court's finding that the Jones Act did not apply was based on

"insufficient facts" and remanded so that facts could be sufficiently developed concerning that issue, the court of appeals noting that, if the Jones Act applied, the district court's dismissal on forum non conveniens grounds would be erroneous); *In re McClelland Engineers, Inc.*, 742 F.2d 837 (5 Cir. 1984) and *McClelland Engineers Inc. v. Munusamy*, 784 F.2d 1313 (5 Cir. 1986)(issuing de facto mandamus and then reversing because district court did not first determine whether the Jones Act applied before denying the forum non conveniens motion, indicating that such determination could not be deferred because, if it applied, the district court would have been correct in denying the motion but, if the Jones Act did not apply, it probably would be error to deny the forum non conveniens motion, 742 F.2d at 838, 839 and 784 F.2d at 1317-1320); *Nicol v. Gulf Fleet Supply Vessels*, 743 F.2d 289 (5 Cir. 1984)

(reversing because the district court, in dismissing for failure to state a claim, erred in failing to directly address the question of whether the Jones Act applied and did not correctly assess the effect of the occurrence of the accident outside the territorial waters of any nation; the court observed that if the Jones Act applied the court "should retain jurisdiction". id. at 293-298); ***Szumlicz v. Norwegian America Lines, Inc.***, 698 F.2d 1192 (11 Cir. 1983) (affirming conclusion of district court that because Jones Act applied, "the case should not be dismissed for forum non conveniens", id. at 1195); ***Needham v. Phillips Petroleum Co. of Norway,*** 715 F.2d 1481 (10 Cir. 1983)("If American law is applicable to the case, the forum non conveniens doctrine is inappliable."); and ***Bartholomew v. Universe Tankships, Inc.***, 263 F.2d 437 (2 Cir. 1959), cert den. 359 U.S. 1000(holding that since the Jones Act applied, "the

court's power to adjudicate must be exercised;" id. at 443).[3]

The above cases are the *only* court of appeals decisions that had to address the issue of how the application of the Jones Act impacts upon the forum non conveniens question in order to decide the case. And in each one of those cases, the Courts consistently held that, if the Jones Act applies, the district court has no discretion to dismiss the case on grounds of forum non conveniens; this, of course, is precisely the holding made by the court

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3. Other cases articulate the rule that the application of the Jones Act mandates retention of the case but the application of that rule was not necessary to reach the decision in those cases because the courts had found that the Jones Act did not apply and, therefore, the Jones Act's impact upon the forum non conveniens question was not in issue. See, e.g., *Chiazor v. Transworld Drilling Co., Ltd.*, 648 F.2d 1015 (5 Cir. 1981), cert den. 455 U.S. 1019; *Vaz Borralho v. Keydril*, 696 F.2d 379 (5 Cir.), reh. 710 F.2d 207 (5 Cir. 1983); *Pereira v. Utah Transport Inc.*, 764 F.2d 686 (9 Cir. 1985), cert dism'd 106 S.Ct. 1253 (1986); and the other cases cited in ftnt 25 in *In re Air Crash Near New Orleans*, 821 F.2d at 1163, 1164, not cited above.

of appeals in this case. See A-19 to A-23. Thus, it is plain that there is no conflict between the "decision" of the Court of Appeals in this case on the Jones Act/forum non conveniens question, and the "decision" of any other court of appeals that had to decide the issue. For that reason, Petition for certiorari should be denied on the second "question presented" by the Petitioners in this case.

2. The issue is virtually sui generis, not important save to the parties themselves and will not have any significant precedential effect.

Even if, *arguendo*, a district court had the power to dismiss even though the Jones Act applies, because of the criteria established by this Court in ***Lauritzen v. Larsen***, 345 U.S. 571 (1952); ***Hellenic Lines Ltd. v. Rhoditis***, 398 U.S. 306 (1970) and ***Romero v. International Terminal Operating Co.***, 338 U.S. 354 (1952) (the so-called ***Lauritzen-Romero-***

Rhoditis trilogy) for determining choice-of-law in a federal maritime case[4], the instances in which there would be sufficient contacts for the application of federal martime law and yet a forum non conveniens dismissal would still be justified under *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947) and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981)[5] would have to

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4. The Court of Appeals defined the Jones Act choice-of-law criteria as follows:

"The Supreme Court in *Lauritzen v. Larsen*, 345 U.S. 571, 583-92 (1953) listed seven factors to be considered in determining whether a claim is subject to the Jones Act: (1) place of the wrongful act; (2) the flag of the vessel; (3) allegiance or domicile of the injured party; (4) allegiance of the shipowner; (5) place and choice of law of the contract; (6) accessibility of a foreign forum; and (7) law of the forum. In *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 308-309 (1970), the Court added an eighth factor: the shipowner's base of operations. In *Rhoditis,* the Court emphasized that the factors should not be applied in a mechanical fashion, and that the list is not exhaustive. *Id.*" See A-13 of Petition.

5. The Court of Appeals detailed the *Gilbert-Piper* criteria as follows:

"The private interest factors include: (1) relative ease of access to sources of proof; (2) availability of compulsory

be so rare as to defy the imagination. To be sure, the criteria for Jones Act, choice-of-law and federal forum non conveniens are not precisely the same (although there are some that are closely related, e.g., "accessiblity of a foreign forum" in choice-of-law and the existence of an "adequate alternative forum" in forum non conveniens) but the essence of those ultimate issues are the same. Thus, if the contacts with the U.S. are "substantial" enough for Jones Act application, this will almost necessarily

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process for attendance of unwilling witnesses, and cost of obtaining attendance of willing witnesses; (3) possibility of viewing subject premises; (4) all other factors that render trial of the case expeditious and inexpensive. (citation omitted).

The public interest factors include: (1) administrative difficulties from court congestion; (2) imposition of jury duty on the people of a community that has no relation to the litigation; (3) local interest in having localized controversies decided at home; (4) the interest in having a diversity case tried in a forum familiar with the law that governs the action; (5) the avoidance of unnecessary problems in conflicts of law. (citation omitted)." See A-18 of Petition.

mean the presence in the U.S. of at least an American flag state, owner of the vessel or base of operations (or, as in this case, the presence of all three) and in any of those instances that will mean that the vessel entity is positioned in the United States with the power to actually control the availability of the relevant witnesses and documents, wherever they may have been located initially (they usually are located in many different countries in international maritime accidents such as this one).[6]

Thus, the instances wherein the Jones Act applies but yet a forum non conveniens dismissal is appropriate, will be so rare that a decision by the Court on that narrow issue will have no precedential

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6. For example, the four depositions taken in this case with reference to choice-of-law and forum non conveniens were *all* taken in San Francisco and Los Angeles, California. The location of those depositions were selected by Brinkerhoff and ARII; the witnesses were there and all relevant documents were there.

value. In such circumstances, this Court normally denies writ of certiorari. See ***Milliken v. Bradley***, 433 U.S. 267, 298 (1977)(Powell, J. concurring)(writ improper given "unique circumstances" of case) and ***Rudolph v. U.S.***, 370 U.S. 269, 270 (1962)("review would be of no importance save to the litigants themselves").

3. In any event, the determination of the impact of the Jones Act on the forum non conveniens question by the Court of Appeals is eminently correct.

The unusual thing about the Court of Appeals' decision in this case is that it is the ***first*** court of appeals to thoroughly articulate the proper basis for the rule that the application of the Jones Act makes the doctrine of forum non conveniens inapplicable. Many courts, as discussed above, had applied the rule but had never really touched upon the proper reason for it. But the Court of Appeals in this case did:

In any event, however, we find the decisions of the Fifth, Tenth and Eleventh Circuits which preclude dismissal of a Jones Act case for *forum non conveniens* to be persuasive. This view is buttressed by decisions of the Supreme Court in which the Court has commented upon the unavailabiity of *forum non conveniens* as a basis for dismissal of cases filed under the Federal Employers' Liability Act (FELA). In *Gilbert*, the Court stated: "It is true that in cases under the Federal Employers' Liability Act we have held that plaintiff's choice of a forum cannot be defeated on the basis of *forum non conveniens*." 330 U.S. at 505. The Court in *Gilbert* cited *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44 (1941) for this proposition. In *Kepner*, the Court stated that the "privilege of venue, granted by the legislative body which created this right of action [under the FELA], cannot be frustrated for reasons of conveniens or expense." 314 U.S. at 54. The Jones Act incorporates the FELA, 46 U.S.C. Sec. 688(a), and both the Jones Act and the FELA have specific venue provisions. The FELA provides in relevant part:

> Under this chapter an action may be brought in a district court of the United States, in the district court of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing the action.

45 U.S.C. Sec. 56.

The portion of the Jones Act which pertains to jurisdiction and venue provides:

> Jurisdiction in [actions under the Jones Act] shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

46 U.S.C. Sec. 688(a).

In view of the Supreme Court's comments as to the unavailability of the *forum non conveniens* doctrine in FELA cases, the degree of similarity between the specific venue provisions under the Jones Act and under the FELA, and the incorporation of the FELA into the Jones Act, we believe that the *forum non conveniens* doctrine should be unavailable as a ground for dismissal under the Jones Act as it is under the FELA. (*Cf. La Seguridad v. Transytur Line*, 707 F.2d 1304, 1310, n. 10 (11 Cir. 1983) (suggesting that Congress implicitly spoke to, and rejected, the *forum non conveniens* doctrine in both FELA and Jones Act cases); *and see Dalla v. Atlas Maritime Co.*, 562 F.Supp. 752, 757 (C.D.Cal. 1983) ("[W]hen a seaman has a cause of action based on American law, he comes by right into American courts."), *aff'd* 771 F.2d 1277 (9 Cir. 1985). Finally, we see no reason to depart from the clear weight of authority in those circuits which have considered this question. We hold that when the Jones Act applies to a seaman's claim, that claim may not be dismissed on the ground of *forum non conveniens*.

See A-21 to A-23 of Petition. In this case, suit was filed in the district court where the Jones Act defendant, Brinkerhoff, has its "pricipal office", namely San Francisco, Caifornia. This is precisely one of places of venue Congress statutorily gave to the Jones Act plaintiffs in this case. Therefore, the district court had no discretion to reject venue in favor of a foreign forum.

The rule referred to in ***Gulf Oil v. Gilbert***, citing ***Baltimore & Ohio v. Kepner***, was further explained by this Court in ***U.S. v. National City Lines***, 334 U.S. 573 (1947). In that case this Court held that the comon law doctrine of forum non conveniens is not available in a case filed in accordance with Sect. 12 of the Clayton Act,[7] which provides for venue in civil antitrust proceedings. 334 U.S. at 574, 575, 578, 596, 597. The Court noted

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7. 38 Stat. 730, 736, c. 323, 15 U.S.C.A. Sect. 22, 4 F.C.A. Title 15, Sect. 22 (Oct. 15, 1914).

that ***Gulf Oil v. Gilbert*** had just been decided by a divided Court and that it involved only the ***general*** venue statute. id. at 597, 598. (per Jackson, J., concurring). It then proceeded to decide the issue of whether cases filed in accordance with Congressionally enacted special venue statutes are subject to the judge-made doctrine of forum non conveniens.[8] In reaching its decision, this Court stated pertinently:

> In the face of this history we cannot say that room was left for judicial discretion to apply the doctrine of forum non conveniens so as to deprive the plaintiff of the choice given by the section. That result, as other courts have concluded, would be utterly inconsistent with the purpose of Congress in conferring the broader range of choice. Tivoli Realty v. Interstate Circuit (CCA 5th Tex, 1948), 167 F2d 155; Ferguson v. Ford Motor Co. (DC SD NY) April 21, 1948) 77 FSupp 425.

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8. The Court defined the issue before it as follows:
"The principle question, and the only one we find it necessary to consider, is whether the choice of forums given to the plaintiff by Sect. 12 is subject to qualification by judicial application of the doctrine of *forum non conveniens*."
92 L.Ed.2d at 1586.

In this view of Congress' action, numerous considerations of policy urged by the appellees as supporting the discretionary power's existence and applicability become irrelevant. Congress' mandate regarding venue and the exercise of jurisdiction is binding upon the federal courts. Const Art 3, Sec. 2. Our general power to supervise the administration of justice in the federal courts, cf. McNabb v. United States, 318 U.S. 332, 87 L ed 819, 63 S Ct 608, does not extend to disregarding a validly enacted and applicable statute or permitting departure from it, even in such matters as venue.

* * * * *

Finally, both appellees and the Distict Court have placed much emphasis upon this Court's recent decisions applying the doctrine of forum non conveniens and in some instances extending the scope of its application. Whatever may be the scope of its previous application or of its appropriate extension, the doctrine is not a principle of universal applicability, as those decisions uniformly recognize. At least one invariable, limiting principle may be stated. It is that whenever Congress has vested courts with jurisdiction to hear and determine causes and has invested complaining litigants with a right of choice among them which is inconsistent with the exercise by those courts of discretionary power to defeat the choice so made, the doctrine can have no effect. Baltimore & O. R. Co. v. Kepner, 314 U.S. 44, 86 L. ed 28, 62 S Ct 6, 136 ALR 1222; Miles v. Illinois C. R. Co. 315 US 698, 86 L ed 1129, 62 S Ct 827, 146 ALR 1104.

334 U.S. at 588, 589, 596 and 597.

This Court's citation in ***National City Lines*** of the ***Kepner*** and ***Miles*** cases (both FELA cases) demonstrates the intent of this Court that FELA and Jones Act (which springs from the FELA) cases will be controlled by the rule enunciated in ***National City Lines*** concerning special venue statutes."

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9. The Petitioner's not-so-veiled attempt to distinguish ***Kepner*** because it did not involve the doctrine of forum non conveniens, is misleading. The question was whether a state court could enjoin a federal court in another jurisdiction, despite the fact the proceeding in such other federal jurisdiction was (for purposes of the decision) inconvenient. The Court stated the issue this way:

> "The real contention of petitioner is that despite the admitted venue respondent is acting in a vexatious and inequitable manner in maintaining the federal court suit in a distant jurisdiction when a convenient and suitable forum is at respondent's doorstep."

314 U.S. at 51. Thus, the question turned on "inconvenience" as does forum non conveniens and whether, assuming a forum given the plaintiff by the FELA is inconvenient, the court can be permanently enjoined from proceeding in that forum precisely because the forum is inconvenient, which is no different from having the case dismissed because the forum is inconvenient.

After ***National City Lines***, Congress enacted 28 U.S.C. 1404(a), which provides that:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

In ***Ex parte*** Collette, 337 US. 55 (1948), the Court addressed the question of how the newly enacted 28 U.S.C. 1404(a) impacted upon Sect. 6 of the FELA. The Court held that 28 U.S.C. 1404(a) did ***not*** effectuate a repeal of Sect. 6 of the FELA, 337 U.S. at 60, 61, but that an FELA action could be removed to another federal district for the convenience of the parties and witnesses as provided for in 28 U.S.C. 1404(a). But the Court made it perfectly clear that it was modifying ***Kepner*** and ***Miles only*** to the extent of 28 U.S.C. 1404(a) - that is forum on conveniens principles could be applied only with respect to transfers between

federal district courts, because Congress had statutorily permitted such transfers. There is nothing in ***Collette*** which holds or implies that the enaction of 28 U.S.C. 1404(a) could provide a basis for the transfer of an FELA or Jones Act suit, filed in a venue specifically provided for in the FELA or Jones Act, to a foreign forum pursuant to the common-law doctrine of forum non conveniens.

Indeed, there is much to the contrary in ***Collette***. The Court quoted the pronouncement in ***Kepner*** that if any modification were to be effectuated with respect to the holding in ***Kepner***, "the remedy is legislative." 337 U.S. at 60, 61. And Congress responded by modifying the holding ***only*** with respect to transfers between federal district courts of the United States Courts and did ***not*** include or discuss modifying ***Kepner*** to allow transfers or dismissals for trial in a more convenient ***foreign*** forum. id. at 61.

It can thus be presumed that Congress did not intend, in enacting 28 U.S.C. 1404(a), to allow FELA and Jones Act cases, and other cases filed pursuant to special venue statutes, to be subject to dismissals to foreign countries pursuant to the common-law doctrine of forum non conveniens. And Congress has not, since ***Kepner*** and ***Miles***, in any way, expressly or impliedly, seen fit to amend the venue provisions of the Jones Act or FELA to make those venue provisions subject to the common law doctrine of forum non conveniens for trial in a more convenient foreign forum.[10]

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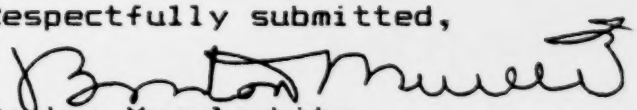
10. We should note the recent case of ***Transunion Corp. v. Pepsico Inc.***, 811 F.2d 127 (2 Cir. 1986), which held that the special venue provisions of RICO, 18 U.S.C. Sec. 1961-1968 (1982), were subject to the doctrine of forum non conveniens. But the Court there misconstrued ***Cruz*** and, rather than accepting the fact that - since the Jones Act did not apply in that case - the ***Cruz*** court's comments about Jones Act cases being subject to forum non conveniens were nothing more than dicta, the ***Transunion*** court persisted in citing ***Cruz*** as authority and in making a weak and inadequate attempt to distinguish ***National City Lines***. 811 F.2d at 130.

In sum, not only is the holding of the Court of Appeals that the application of the Jones Act requires the district court to retain the case and not dismiss on grounds of forum non conveniens consistent with all circuit courts that have decided the question rather than expostulating unnecessary dicta, but it is consistent with the decisions of this Court. Thus, the writ of certiorari with respect to the second question presented by Petitioners should be in all things denied.

Respectfully submitted,



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No. 87-1122

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CROWLEY MARITIME CORPORATION, et al.,
Petitioners,

v.

SHEREEN RAMONA ZIPFEL, et al.,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTION

Petitioners Crowley Maritime Corporation, Brinkerhoff Maritime Drilling Corporation, Brinkerhoff Maritime Drilling Corporation S.A. and Brinkerhoff Maritime Drilling Corporation PTE, Ltd. (collectively "Crowley"), respectfully submit this Supplemental Brief pursuant to the provisions of Supreme Court Rule 22.6. Crowley's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit is dated and was filed December 23, 1987. It was docketed by the Supreme Court on January 4, 1988 as action No. 87-1122, and is currently pending. The petition presents two questions, the first concerning the propriety of a federal court injunction and the second concerning the impact of this Court's reasoning in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) on the applicability of *forum non conveniens* in a Jones Act case (46 U.S.C. § 688). This Supplemental Brief concerns itself only with the second question, and

Crowley files it to call the Court's attention to the new Fifth Circuit cases of *Gonzalez v. Naviera Neptuno A.A.*, 832 F.2d 876 (5th Cir. 1987) and *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374 (5th Cir. 1988).

THESE RECENT FIFTH CIRCUIT CASES CONFIRM THE CONFLICT WITH THE NINTH CIRCUIT REGARDING FORUM NON CONVENIENS ANALYSIS IN A JONES ACT CASE

As noted on page 4 of Crowley's petition, after receipt of the Ninth Circuit's original decision herein (*Zipfel v. Halliburton Co.*, 820 F.2d 1438 (9th Cir. 1987)), Crowley, by way of a timely petition for rehearing and rehearing en banc, called the Ninth Circuit's attention to the then-recently decided Fifth Circuit en banc decision of *In Re Air Crash Disaster Near New Orleans, Louisiana*, 821 F.2d 1147, 1164 n. 25 (5th Cir. 1987) ("*Air Crash*"). *Air Crash* is contrary to the Ninth Circuit's position that *forum non conveniens* has no role in a Jones Act case. Furthermore, Crowley noted that the Fifth Circuit had been persuaded by the reasoning of Judge Schwarzer in the *Zipfel* district court opinion (*sub nom. Sherrill v. Brinkerhoff Maritime Drilling*, 615 F.Supp. 1021 (N.D. Ca. 1985)) regarding the impact of *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) on the Jones Act/*forum non conveniens* issue. Crowley also advised the Ninth Circuit that *Air Crash* disapproved and overruled the earlier Fifth Circuit authority that had been heavily relied upon by the Ninth Circuit herein in reaching its contrary *forum non conveniens* conclusion.

Notwithstanding the foregoing, the Ninth Circuit denied the petition for rehearing but did acknowledge the *Air Crash* case in a footnote which was added to its republished decision (*see, Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1486 n. 9 (9th Cir. 1987)). In that footnote, the Ninth Circuit declined to follow the *Air Crash* case and noted that the Fifth Circuit change of position on the Jones Act/*forum non conveniens* issue was "signaled" in a footnote by a "divided en banc panel of the Fifth Circuit, with Judges Garza, Johnson, Garwood and Higginbotham not joining in the footnote . . . " Further, the Ninth Circuit stated in that footnote that "*Air Crash* was not a Jones Act case." The addition

of footnote 9 to the *Zipfel* opinion below was the extent of the Ninth Circuit's discussion of the *Air Crash* case. The Ninth Circuit declined to consider the reasoning of Judge Schwarzer in the district court below or of the Fifth Circuit concerning the impact of *Piper Aircraft Co. v. Reyno, supra*, on a maritime personal injury case brought under U.S. law.

Respondents assert that the reasoning of the Fifth Circuit in *Air Crash* should be ignored because the Fifth Circuit's maritime law/*forum non conveniens* language is mere dicta contained in a footnote. However, the new and subsequent Fifth Circuit decisions establish beyond question that the intent of *Air Crash* was to follow this Court's lead in *Piper Aircraft Co. v. Reyno, supra*, and state a fundamental and significant doctrine of maritime law. Furthermore, there can be no doubt that the Fifth Circuit's position regarding maritime *forum non conveniens* is in complete opposition to that of the Ninth Circuit.

In *Gonzalez v. Naviera Neptuno A.A., supra*, a unanimous panel (including Judge Higginbotham who had declined to join footnote 25 of the *Air Crash* decision) recognized that it was "[b]ound by the decision of the en banc court that there is no need for a different analysis in maritime cases" regarding *forum non conveniens*. 832 F.2d at 877.

The *Gonzalez* court continued:

> *Air Crash* directs us away from the tortuous detours taken in recent years by maritime jurisprudence back to the straight and narrow (or straighter and narrower) path set out by *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947) and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981).
>
> *Id.* at 878.

Similarly, the unanimous Fifth Circuit panel in the very recent decision of *Camejo v. Ocean Drilling & Exploration, supra*, (including Judge Johnson who had declined to join the *Air Crash* footnote 25) also recognized that *Air Crash* was more than mere dicta; rather, it affirms that the maritime law in the Fifth Circuit now follows *Piper*. At 838 F.2d 1378, the *Camejo* opinion charac-

terized the previous rule regarding the non-applicability *forum non conveniens* to Jones Act cases as the "old law" that has now been changed by *Piper*. The Fifth Circuit specifically disassociated itself from the Ninth Circuit on this issue by its reference (at 838 F.2d 1379 n. 14) to the Ninth Circuit case of *Villar v. Crowley Maritime Corp.*, 782 F.2d 1478, 1479 (9th Cir. 1986). At page 1379 of its decision, the *Camejo* panel described the *Air Crash* case as setting forth the "new law" and referred to the same as a *holding* of the Fifth Circuit.

Any litigant in the Fifth Circuit attempting to disregard the new law of *Air Crash* on the grounds urged by respondents herein or suggested by the Ninth Circuit (i.e., that *Air Crash* was merely dicta) will be doomed to failure because those judges have clearly closed ranks and have given notice to litigants of exactly what the law of the Fifth Circuit is regarding maritime *forum non conveniens*. By the same token, Crowley submits that it is superficial and unrealistic to argue (as respondents do herein) that there is no real conflict on this important doctrine between the Fifth and the Ninth Circuits. On the contrary, today two of the leading and busiest maritime circuits in the United States are at complete odds with each other on a question as fundamental and far-reaching as the proper role of *forum non conveniens* in a maritime personal injury case. Literally hundreds of cases a year are and will continue to be affected by this unsettled state of the law. Any injured maritime worker who can make a colorable claim that his case would be governed by U.S. law if heard here is well-advised to file his action in the Ninth Circuit where *forum non conveniens* is inapplicable, and avoid the Fifth Circuit and the Second Circuit where the *forum non conveniens* doctrine is applied. *See, also, Cruz v. Maritime Co. of Philippines*, 702 F.2d 47 (2d Cir. 1983). Crowley respectfully urges that this Court resolve the existing conflict among the circuits by adopting a uniform rule regarding the impact of *Piper Aircraft Co. v. Reyno, supra*, on maritime personal injury claims and *forum non conveniens*.

CONCLUSION

For the foregoing reasons, petitioners have filed this Supplemental Brief in support of their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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